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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 162

MARIE P. RICHARD,
Appellant,

versus

TRAVELERS INSURANCE CO., ET AL,
Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

J. MINOS SIMON
1408 Pinhook Road
Post Office Box 52116, OCS
Lafayette, Louisiana 70501
ATTORNEY FOR APPELLANT

MONTGOMERY & CO., 1107 Poydras Street, New Orleans, Louisiana

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	3
QUESTIONS PRESENTED	4
STATE LAWS INVOLVED	5
CONCISE STATEMENT OF THE CASE	5
REASONS FOR ALLOWING THE WRIT	8
CONCLUSION	23
CERTIFICATE	23
APPENDICES:	
A. OPINION OF THE COURT OF APPEAL, THIRD CIRCUIT, STATE OF LOUISIANA	28
B. DISSENTING OPINION OF JUDGE TATE OF THE COURT OF APPEAL, THIRD CIRCUIT, STATE OF LOUISIANA	32
C. LOUISIANA CONSTITUTION, ARTICLE 7, SECTIONS 29 and 41	44
D. LOUISIANA CODE OF CIVIL PROCEDURE, ARTICLES 1731 - 1814	46
E. APPLICATION FOR REHEARING IN THE COURT OF APPEAL, THIRD CIRCUIT, STATE OF LOUISIANA	56
F. LOUISIANA SUPREME COURT, APPLICATION FOR REMEDIAL WRITS TO THE COURT OF APPEAL, THIRD CIRCUIT, STATE OF LOUISIANA	73

AUTHORITIES CITED

Page

Capitol Traction Co. v. Hof., 19 S.Ct. 594 ..... 11, 14, 15

Chicago B & Q R. Co. v. City of Chicago (1897), 166 U.S. 242, 17 S.Ct. 581 ..... 12, 16

Davidson v. New Orleans, 96 U.S. 97 ..... 12, 22

Duncan v. State of Louisiana, 88 S.Ct. 1444 ..... 22, 25

Justices v. Murray, 9 Wall. 274, 278, 76 U.S. 278 16

Loan Association v. Topeka, 20 Wall. 655 12

Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 20

Mayes v. McKeithen, Pending in the United States Supreme Court under Docket Number 1580, October Term, 1968 8

Parsons v. Bedford, 28 U.S. 433 ..... 9, 18

Richard v. Curtis, 216 So.2d 676, 219 So.2d 175 2

Simler v. Conner, 372 U.S. 221, 83 S.Ct. 609 ..... 13, 17

United States v. Wonson, 1 Gall. 5 Fed.Cas. No. 16, 750 15

United States, ex rel., Toth v. Quarles, 350 U.S. 11, 76 S.Ct. 1 13

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TO THE HONORABLES, THE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana finally entered on February 28, 1969, whereby petitioner's application for remedial writs for a review of the judgment of an intermediate appellate state court was denied.

The effect of the denial of review by the Louisiana Supreme Court, the State's court of last resort, is the approval of the decision of the intermediate State court, i.e., Court of Appeal, Third Circuit, State of

Louisiana. The appellate court's decision instances a reversal on the facts of a jury verdict as to quantum in favor of petitioner and against named defendants for physical injuries sustained by petitioner and resulting from the wrongful conduct of defendants, contrary to petitioner's constitutional right under the second clause of the Seventh Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

The opinion of the Court of Appeal, Third Circuit (a three judge appellate court panel divided 2 to 1 as to said decision), reported as *Richard v. Curtis*, 216 So.2d 676, is reproduced in Appendix A. The decision of the Louisiana Supreme Court, denying remedial writs as to the intermediate appellate court's decision, reported as *Richard v. Curtis, et al*, 219 So.2d 175, reads in its entirety as follows:

> "Writs refused. On the facts found by the Court of Appeal we find no error of law in its judgment.
>
> /s/ WBH
> /s/ JBF
> /s/ JBH
> /s/ EHMcC
> /s/ MEB
>
> "SANDERS, J., is of the opinion a writ should be granted.

"SUMMERS, J., is of the opinion a writ should be granted."

JURISDICTION

This case was tried to a jury which returned a verdict in favor of petitioner and against defendants on the question of a claim for damages resulting from physical injuries sustained by petitioner in consequence of the negligence of defendants. The unanimous verdict of the jury awarded to petitioner the sum of Twenty One Thousand Two Hundred ($21,200.00) Dollars. In due course the trial court awarded a judgment to petitioner and against defendants in keeping with the jury verdict. Defendants appealed the verdict and judgment to the Court of Appeal, Third Circuit, State of Louisiana. On December 5, 1968, said intermediate appellate court by a 2 to 1 decision reversed the findings of fact of the jury as to the amount of petitioner's damages and supplanted its own view of the purport of the testimony and the evidence for that of the jury. In a timely application for rehearing petitioner challenged the validity of the decision and action of the intermediate state court in re-examining the facts found by the jury on the basis that this decision was contrary to the second clause of the Seventh Amendment and a denial of due process proscribed by the Fourteenth Amendment. Rehearing was denied and a timely application for remedial writs filed with the Louisiana Supreme Court as to that decision was denied by a divided court, without opinion. Among the errors assigned by her in her application for remedial writs

filed with the Louisiana Supreme Court was the following:

> "The re-examination by respondent court of the jury findings and modification of its award, where no application for remittur was made in the trial court, deny relatrix of her constitutional rights secured to her by the Fifth, Seventh and Fourteenth Amendments to the United States Constitution."

Petitioner invokes the provisions of 28 USC, Section 1257 (3) as jurisdictional grounds for this application

QUESTIONS PRESENTED

1. Is the last clause of the Seventh Amendment proscribing re-examination of facts found by a jury obligatory on a state court, where the Legislature of that state has granted to its citizens by statute plenary right to trial by jury of all issues of fact involved in claims in the nature of suits at common law?

2. Is the proscription against re-examination of jury findings by any court such a fundamental part of due process as to fall under the protective aegis of the due process clause of the Fourteenth Amendment and thus obligatory on state courts, where citizens of such a state have been granted the statutory right of trial by jury of all issues of fact involved in claims in the nature of suits at common law?

STATE LAWS INVOLVED

State laws involved in this matter include the provisions of Article 7, Section 29 of the Louisiana Constitution which provides for appellate review in civil cases; the provisions of Article 7, Section 41 of the Louisiana Constitution which provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; and the provisions of the Louisiana Code of Civil Procedure, Articles 1731-1814, which provide for trial by jury in civil cases in Louisiana. These state laws are reproduced in Appendix B.

CONCISE STATEMENT OF THE CASE

Petitioner, Marie P. Richard, a widow for more than ten years, charged with the burden of raising and providing for a minor son, became the victim of an automobile collision on November 13, 1966. She sustained permanently disabling injuries as a result of this accident, consisting of tearing and stretching type trauma to the soft tissue structures of her cervical and lumbar spine, including such structures as the ligaments and nerve sheaths of nerve roots, as well as an aggravation of previously existing but until then, nondisabling and quiescent bony anomalies of her lower back. These injuries disabled her from engaging in her occupational duties, which she had to pursue for the support of herself and her minor child, from the date of their onset to the date of trial, with a concomitant loss of wages of Seven Thousand ($7,000.00) Dollars and an expected future loss of wages for an indefinite

period of time into the future. She further sustained medical expenses in the accrued amount of Five Hundred Forty One and 71/100 ($541.71) Dollars.

In the due course of events she filed a lawsuit. All issues of fact were tried to a jury. After hearing the evidence the jury returned a unanimous verdict in favor of petitioner in the sum of Twenty One Thousand Two Hundred ($21,200.00) Dollars. This verdict was reduced to judgment by the district court.

Not once at the trial court level did the defendants complain that they did not receive a fair trial; that the jurors did not act fairly and impartially; that defendants were in any way denied of the opportunity fully and fairly to present their side of the case; that rulings of the trial judge were either erroneous or in some way operated to impair defendants in their quest to effectively present available evidence to the jury; though, if such a state of fact existed, defendants had the right to raise these issues by way of an application for a new trial. Furthermore defendants registered no complaint as to the amount of the verdict, despite the fact that under the statutory scheme of jury trial in Louisiana said defendants, should they have felt aggrieved by the amount of the jury verdict, had the legal right to seek remittitur as is common to jury trials according to the common law. Defendants appealed the verdict and the judgment to the Court of Appeal, Third Circuit of Louisiana.

The burden of their appeal engaged the appellate court in a re-examination of the findings of the jury

as to both the question of liability and the question of the amount of the award made by the jury. The appellate court rendered a decision on December 5, 1968. In this decision the court undertook to re-examine the findings of fact made by the jury as to both of the essential questions urged by defendants. It affirmed the findings of fact of the jury as to liability but reversed the jury's findings of fact as to the amount of the award and supplanted these findings with findngs of its own by a divided court of 2 to 1. According to the findings of fact as to injury and consequent damage the majority opinion of the appellate court reduced the jury award from Twenty One Thousand Two Hundred ($21,200.00) Dollars to the sum of Ten Thousand ($10,000.00) Dollars.

On rehearing application petitioner complained to the state appellate court that its decision, in reversing the findings of fact of the jury, was in violation of the provisions of the Seventh Amendment, specifically the second clause thereof, and of the due process clause of the Fourteenth Amendment. Rehearing, however, was denied without the assignment of any reason whatever.

Petitioner then applied to the Louisiana Supreme Court, the State's court of last resort, for remedial writs, and among her assignment of errors, registered the following complaint:

> "The re-examination by respondent court of the jury findings and modification of its award, where no application for remittitur was made

in the trial court, deny relatrix of her constitutional rights secured to her by the Fifth, Seventh and Fourteenth Amendments to the United States Constitution."

In a 5 to 2 denial of this application, the Louisiana Supreme Court tersely responded:

> "Writ refused. On the facts found by the *Court of Appeal* we find no error of law in its judgment."

Thus the Louisiana Supreme Court attached greater significance to the "facts found by the Court of Appeal", which never had the opportunity to see and hear the witnesses, than it did to the facts found by the jury, who were instituted by the laws of Louisiana to sit as a body to see and hear the witnesses, evaluate their credibility, and thus become the sole judges of the facts.

The reason given by the Louisiana Supreme Court for refusing to grant remedial writs is identical to that given by that same court in the matter of *Mayes v. McKeithen,* pending before this court on application for writ of certiorari under docket number 1580 of the October Term, 1968.

REASON FOR ALLOWING THE WRIT

THE SUPREME COURT HAS NEVER RULED ON THE APPLICATION OF THE

SECOND CLAUSE OF THE SEVENTH AMENDMENT TO THE STATES

The Seventh Amendment contains two distinct clauses:

1. "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved," and

2. "No fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Mr. Justice Story declared the two clauses severable in *Parsons v. Bedford*, 28 U.S. 433, 447-448:

> "But the other clause of the amendment is still more important, and we read it as a substantial and independent clause. * * * This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner (than by the) modes known to the common law. * * *"

Necessary to the decision of this application therefore is not whether the Seventh Amendment grants trial by jury in state courts. The basic, essential question is whether or not the second clause ("more important" because it insures that jury trial will be a reality rather than a promise) is obligatory on the several states, either directly or indirectly through the

Fourteenth Amendment. This is the case because the State of Louisiana has already granted trial by jury to its citizens by legislative enactment. This legislative grant, however, is more illusory than real. In practice the state grants the right but withholds the privilege of jury trial. The withholding of this legislative grant of trial by jury is accomplished by the act of re-examining the jury findings by the appellate courts of the state. In the context of this case and similar ones such action constitutes an unconstitutional assumption of power by the appellate courts of Louisiana, and consequently results in the denial of constitutional due process. To understand the enormity of that denial, an understanding of the nature of the jury trial granted to petitioners and other citizens of Louisiana by the Legislature is helpful.

Articles 1731-1814 of the Code of Civil Procedure of Louisiana grant trial by jury to all citizens of the State as to all claims for $1,000.00 or more, with the few exceptions noted in Article 1733. To all intents and purposes these provisions of Louisiana law are a codification of the common law concept of jury trial. That the legislature intended that the jury would be the sole judges of the facts is made abundantly clear by the provisions of Article 1792:

> "In its charge to the jury the judge shall instruct the jurors on the law applicable to the cause submitted to them, but he shall not recapitulate or comment upon the evidence so *as to exercise any influence upon their decision as to the facts.*"

Such scrupulous regard for the province of the jury in this respect is in the highest tradition of jury trial. It leaves the jury free to do that which the law charges it to do, namely, weigh the evidence and pass upon the credibility of witnesses. The jury's findings of fact is binding upon the trial court and a new trial can be granted as to such findings only if it be proved that the jury was bribed or has behaved improperly so that impartial justice has not been done. Article 1814. Moreover the trial court is without authority to alter the verdict of the jury as to the amount of the award. In this respect he is limited to entering a remittitur or an additur but then only with the consent of the party affected. The only alternative to not receiving consent to either a remittitur or additur is the granting of a new trial. Article 1813. Thus the thrust of this legislative enactment simply means that the Louisiana Legislature intended the findings of fact made by the jury to be conclusive, absent the misbehavior of the jury that results in a denial of impartial justice, Article 1814, or the making of an award which shocks the conscience or sense of fair play. Article 1813. This trial by jury instituted by the laws of Louisiana obviously is one consistent with the common law concept of jury trial and contemplated by the Seventh Amendment to the Constitution. *Capitol Traction Co. v. Hof.*, 19 S.Ct. 594, 595.

If such trial by jury is one contemplated by the Seventh Amendment, then can a state appellate court, by re-examining the jury findings and reaching a contrary fact-finding conclusion based only on a reading of a printed record of the evidence, deny a

citizen of the jury verdict without offending the due process clause of the Fourteenth Amendment and the second clause of the Seventh Amendment? Petitioners believe not. To permit such a result is to permit the state to make *anything* due process which its judiciary chooses to declare is due process. But this is not possible. *Davidson v. New Orleans,* 96 U.S. 97; *Chicago B & Q R. Co. v. City of Chicago,* (1897) 166 U.S. 242, 17 S.Ct. 581. All branches of state government are subject to the constraints of the Constitution. One branch of the state government cannot take away that which the other gives any more or less than can the whole state, where the commodity is due process, without doing violence to the essential nature of free government. Mr. Justice Miller spoke forcefully of this fact of constitutional law when he said in *Loan Association v. Topeka,* 20 Wall. 655, 663:

> "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power, which grow out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

When the Louisiana Legislature granted trial by jury, it granted to its citizens a fundamental right, a right

endemic in the very concept of liberty, and one considered as an indispensable safeguard of liberty. Trial by jury ranks very high in the catalogue of constitutional safeguards, *U.S., ex rel., Toth v. Quarles,* 350 U.S. 11, 76 S.Ct. 1, and the federal policy favoring jury trials is of historic and continuing strength. *Simler v. Conner,* 372 U.S. 221, 83 S.Ct. 609. Forasmuch as trial by jury is part of the judicial process, it is, therefore, an essential part of due process contemplated by the Fourteenth Amendment. While it has been variously described, trial by jury universally has been characterized as a bulwark of protection for the common man in an open society. The Continental Congress, in the Declaration of Rights adopted October 14, 1774, described it as "the great and inestimable privilege of being tried by their peers of the vicinage". However described or characterized for certain history holds that nothing is more fundamental, nothing is held more inviolate, and nothing is more concomitant to a free democracy than one's right to be judged by his peers. It stands out in this country as a notion of the common man's political right which pervades the entire fabric of the democratic cloth. In its daily implementation it represents the dynamic participation of the governed in their government, the essential expression of the will of the people in a system of free institution as to which they have given their consent, and the partial fulfillment of the ancestral pledge of a government of the people.

History teaches further that the findings of one's peers were not to be subverted by the officials of gov-

ernment. Right or wrong these findings, when made according to law, were to be final. They were not to be re-examined according to the rules of the common law. As the court observed in *Capitol Traction Co.*, supra, (19 S.Ct. at p. 583):

> "A comparison of the language of the Seventh Amendment, as finally made part of the Constitution of the United States, with the Declaration of Rights of 1774, with the ordinance of 1787, with the essays of Mr. Hamilton in 1788, and with the Amendments introduced by Mr. Madison in Congress in 1789, strongly tends to the conclusion that the Seventh Amendment, in declaring that 'no fact tried by jury shall be otherwise re-examined, in any court of the United States, than according to the rules of common law', had in view the rules of the common law of England, and not the rules of that law as modified by local statute or usage in any of the states.
>
> * * * *
>
> "* * * 'Beyond all question, the common law here alluded to is not the common law of any individual state, for it probably differs in all, but it is the common law of England, the grand reservoir of all our jurisprudence. Now according to the rules of the common law, the facts once tried by a jury are never re-examined, unless a new trial is granted in

> the discretion of the court before which the suit is pending, for good cause shown, or unless the judgment of such court is reversed by a superior tribunal on a writ of error, and a venire facias de novo is awarded. This is the invariable usage, settled by the decisions of ages.'"

Even as early as 1812 an insidious intrusion into the province of the jury as fact-trier was finding roots in the New England States. This fact is exemplified by the decision in *United States v. Wonson*, 1 Gall. 5 Fed. Cas. No. 16, 750, mentioned in *Capitol Traction Co.*, supra. This insidious intrusion consisted of efforts by state appellate courts of re-examing findings made by juries. In rejecting this foreign notion Mr. Justice Story is quoted as having held: (19 S.Ct. at p. 583)

> "We should search in vain in the common law, for an instance of an appellate court retrying the cause by a jury, while the former verdict and judgment remained in full force. The practice, indeed, seems to be a peculiarity of New England, and, if I am not misinformed, does not exist in more than one (if any) other state in the Union."

And now, more than one hundred years later, the same foreign notion rejected in WONSON is presented in this application for adjudication by this court. This notion is just as pervasively harmful to due process in 1969 as it was in 1812. The immediate question is wheth-

er or not the second clause of the Seventh Amendment and the due process clause of the Fourteenth Amendment, viewed against the backdrop of an ever-evolving jurisprudence exhibiting an ever-expanding concern for individual liberty, will permit this foreign notion to subvert the due process rights of the citizens of Louisiana.

As early as 1870 in the case of *Justices v. Murray*, 9 Wall. 274, 278, 76 U.S. 278, it was held that the proscription of the Seventh Amendment as to re-examination of jury findings applied not only to cases tried in the court of the United States but also to cases of "federal cognizance", coming up from state courts.

In 1897 the proscription of the second clause of the Seventh Amendment operating against federal courts was extended to apply to suits at common law tried before a jury in a state court. *Chicago B & Q R. Co.*, supra. In that case in speaking of this clause of the Seventh Amendment the court held: (17 S.Ct. at P. 587)

> "It is clear that the last clause of the seventh amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States. *It applies equally to a case tried before a jury in a state court, and brought here by writ of error from the highest court of the state.* * * *"

It is also well settled that in diversity jurisdiction cases appearing before the federal courts the Seventh

Amendment applies in full force. *Simler v. Conner,* 372 U.S. 221, 83 S.Ct. 609. Said the court in SIMLER: (83 S.Ct. at P. 610-611):

> "We agree with respondent that the right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions. The federal policy favoring jury trials is of historic and continuing strength. Parsons v. Bedford Breedlove & Robeson, 3 Pet. 433, 446-449, 7 L.Ed. 732; Scott v. Neely, 140 U.S. 106, 11 S.Ct. 712, 35 L.Ed. 358; Byrd v. Blue Ridge Rural Electric Co-operative, Inc., 356 U.S. 525, 537-539, 78 S.Ct. 893, 900-901, 2 L.Ed.2d 953; Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988; Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44. Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved. In diversity cases, of course, the substantive dimension of the claim asserted finds its source in state law, Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 118; see Cities Service Oil Co. v. Dunlap, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196; Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645, but the characterization of that state-created claim as legal or equitable for purposes of whether a right to jury trial is indicated must be made by recourse to federal law."

Thus, whether the case is one of "federal cognizance" tried before a jury but coming from a state court, or one involving a suit at common law tried before a jury in a state court, or one of diversity jurisdiction in federal court applying state laws tried before a jury, the last clause of the Seventh Amendment on re-examination applies against the courts of the United States. Thus far, however, the state appellate courts of Louisiana and elsewhere have been permitted to do that which the last clause of the Seventh Amendment prohibits and that which this court has denied to itself and all federal courts in deference to the proscription of the Seventh Amendment.

Why is this so? How is it possible, consistently with the theory of federalism, for a state court to have greater power than the United States Supreme Court vis-a-vis the United States Constitution? Trial by jury is too important and transcendent a right of American justice to permit such a hybridization. It is a right justly dear to the American people. *Parsons v. Bedford*, supra. Legal writers from the time of Blackstone have advocated jury trial in the strongest terms:

> "The trial by jury is looked upon as the glory of the English law, * * * an advantage in regulating the civil property, * * * the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals. * * * Because Rome, Sparta and Carthage have lost their

liberties, therefore those of England in time must perish. But it must be recollected, that those states, at the time when their liberties were lost, were strangers to the trial by jury." Blackstone's Commentaries, Gavit Edition (1941), 689-90.

Emphasizing the underlying reason for jury trial (which so adroitly applies to this case) he further observed:

"If (the impartial administration of justice) be entirely entrusted to the magistracy, a select body of men, usually chosen * * * by parties holding the highest office in the state, their decisions will frequently have an involuntary bias toward those of their own rank and dignity; for it is not to be expected, that the few should be always attentive to the interest and good of the many.

* * * *

"This, therefore, preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens." Id, 690.

If trial by jury truly is a basic and fundamental feature of the American concept of justice, then no state court, under the process of re-examining the findings of a jury, should be permitted to deny this funda-

mental right to any citizen. Yet this is the unfortunate circumstance of citizens of Louisiana and citizens in some of the other states. Under the present law there exists a double standard in connection with the administration of the fundamental rights embodied in the Seventh Amendment. A full realization of this fundamental right is a fact of life in a federal tribunal. A complete negation of that right is a fact of life in the courts of Louisiana. A Louisiana citizen, who can show diversity of citizenship, can walk across the street from a state court into a federal court and enjoy the full benefit of trial by jury as secured by the Seventh Amendment; whereas, another Louisiana citizen, unable to establish diversity of citizenship, is denied the great privilege of jury trial, though the same state laws and the same basic, essential state facts are involved.

It is against the dictates of logic and common sense that citizens of Louisiana are entitled to the fundamental rights secured by the Seventh Amendment if their "state case" is brought in federal court but are denied of that fundamental right if their case is instituted in a Louisiana state court. Moreover, such a double standard practice in the area of federally secured fundamental rights is no longer constitutionally tolerable. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684. In closing the doors shut tight against this practice the court in MAPP said: (81 S.Ct. at P. 1693)

> "There is no war between the constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally

> seized, but a state's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same amendment. Thus the state, by admitting evidence unlawfully seized, serves to encourage disobedience to the federal constitution which it is bound to uphold. Moreover, as was said in *Elkins*, 'the very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts."

The same common sense reason applies in the instant case. By usurping the powers of the jury and supplanting its judgment of the facts for that of the jury the Louisiana appellate court acted in disobedience of the second clause of the Seventh Amendment. In so doing it widened and deepened the chasm between the federal rule and the Louisiana rule as to the fundamental rights of citizens under the Seventh Amendment. Thus in so doing it increased the needless conflict between the state and federal courts and further impaired the essence of a healthy federalism.

The right to trial by jury in Louisiana has its origin in the state constitution. Louisiana Constitution, Article 7, Section 41, provides:

> "The Louisiana Legislature *shall* provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases * * *."

The state Legislature, in formulating jury trial by statute, was simply carrying out a constitutional mandate of the people. The people of Louisiana have made it unmistakably clear that they, like the other millions of Americans, consider jury trial a fundamental part of due process.

> "The guarantees of jury trial in the federal and state constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. * * * Beyond this, the jury trial provisions in the federal and state constitutions reflect a fundamental decision about the exercise of official power — a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan v. State of Louisiana,* 88 S.Ct. 1444, 1451.

Such a right assuredly is protected by the Fourteenth Amendment. And the shield of protection of the Fourteenth Amendment is no less invincible in this case simply because petitioners' right to trial by jury is denied by judicial authorities. As this court was apt to say in *Davidson v. New Orleans,* 96 U.S. 97, 102:

> "But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, *and yet it might be that its final action*

would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, and has no application, where the invasion of private rights is effected under the forms of state legislation.' The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law." See also Cooper, et al v. Aaron, et al, 358 U.S. 1, 78 S.Ct. 1401.

CONCLUSION

The burden of widowhood and of the tireless effort to support and maintain her minor son has been made doubly onerous by the disabling physical injuries inflicted upon her as a result of the negligence of defendants in this case. After a fair and impartial trial it was the unanimous view of a twelve man jury that the least defendants should pay to petitioner in damages, including the loss of earnings, was the relatively small sum of Twenty One Thousand Two Hundred ($21,200.00) Dollars. Petitioner has not only been made to suffer her physical injuries through no fault of her own, but now she has lost her jury verdict because two judges of an intermediate appeal court of Louisiana, who did not see or hear the witnesses, usurped

the function of the jury and supplanted the jury verdict with a contrary decision of their own. This action of the state appellate court, and its approval by the Louisiana Supreme Court, are patently arbitrary in the context of the due process clause of the Fourteenth Amendment. It should be reversed if petitioner's rights are to be vindicated and if illegal encroachment on the province of the jury is to be arrested.

> "The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that constitutional rights are preserved. * * * Our duty to preserve this one of the Bill of Rights may be peculiarly difficult for here it is our own power which we must restrain. * * * I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy. * * * Appellate courts should be alert to insure the preservation of this constitutional right even though each case necessarily turns on its own peculiar circumstances." Galloway v. United States, 319 U.S. 372, 407 (dissenting opinion).

Official self-restraint is one of the surest and least troublesome safeguards of the individual's constitutional liberty. Judicial self-restraint on the part of this court primarily has been responsible for the full sway of the important right of trial by jury contemplated by the Seventh Amendment. The lack of judicial self-

restraint on the part of Louisiana appellate courts occasions the loss to Louisiana citizens of this "inestimable" right. In the context of the facts of this case and of the due process clause of the Fourteenth Amendment this lack of judicial self-restraint is so gross in character as to amount to affirmative state action offensive to that amendment. This appears ture because the proscription against re-examination of the findings of a jury embodied by the Seventh Amendment is fundamental to due process and falls under the protective aegis of the ever expanding concept of due process embodied in the Fourteenth Amendment. The ever-expanding nature of that concept is illustrated by these words of the court in *Duncan v. State of Louisiana*, supra: (88 S.Ct. at P. 1446-1447)

> "The Fourteenth Amendment denies the States the power to 'deprive any person of life, liberty, or property, without due process of law.' In resolving conflicting claims concerning the meaning of this spacious language, the court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight amendments to the Constitution have been held to be protected against state action by the due process clause of the Fourteenth Amendment. That clause now protects the right to compensation for property taken by the state; the rights of speech, press, and religion covered by the First Amendment; the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized; the

right guaranteed by the Fifth Amendment to be free of compelled self-incrimination; and the Sixth Amendment rights to counsel, to a speedy and public trial, to confrontation of opposing witnesses, and to compulsory process for obtaining witnesses."

WHEREFORE PETITIONER RESPECTFULLY PRAYS that a writ of certiorari issue in due course as provided for by law and the rules of this court.

Respectfully submitted,

J. MINOS SIMON
1408 Pinhook Road
Post Office Box 52116, OCS
Lafayette, Louisiana

ATTORNEY FOR
PETITIONER

CERTIFICATE

STATE OF LOUISIANA
PARISH OF LAFAYETTE

I, J. MINOS SIMON, counsel for petitioner and a member of the bar of the United States Supreme Court, hereby affirm under oath that a copy of the foregoing petition for a writ of certiorari has been served on the parties hereto by mail, in a properly addressed envelope, postage prepaid, as follows, to-wit:

Honorable Val J. Courville
Clerk, Louisiana Supreme Court
301 Loyola Avenue, Room 220
New Orleans, Louisiana

Mr. James J. Davidson, III
Davidson, Meaux, Onebane & Donohoe
Post Office Drawer 3507
Lafayette, Louisiana
ATTORNEY FOR DEFENDANTS

LAFAYETTE, LOUISIANA, this ____ day of May, 1969.

J. MINOS SIMON

SWORN TO AND SUBSCRIBED before me on this ____ day of May, 1969, at Lafayette, Louisiana.

NOTARY PUBLIC
(Signed - John Rixie Mouton)

APPENDIX A

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

No. 2521

MARIE RICHARD,
Plaintiff-Appellee,
versus
LOIS VICKERS CURTIS et al.,
Defendants-Appellants.

Appeal from the Fifteenth Judicial District Court, Parish of Lafayette; Honorable Lucien C. Bertrand, Jr., District Judge, Presiding.

Before TATE, FRUGE, and SAVOY, Judges.

SAVOY, Judge.

This is an action in tort. Plaintiff was injured in an automobile accident. Liability is not at issue on appeal. The only issue for determination is whether a jury award in favor of plaintiff in the sum of $21,200.00 was so excessive so as to be a clear abuse by the jury under the guidelines set forth in Gaspard v. LeMaire, 245 La. 239, 158 So.2d 149; Lomenick v. Schoeffler, 250 La. 959, 200 So.2d 127, and Ballanga v. Hymel, 247 La. 937, 175 So.2d 274.

Plaintiff suffered a whiplash injury on November 13, 1966.

She was seen and examined by Dr. C. J. Schexnaildre, Jr., on November 14, 1966. He made a general examination of the patient. Positive findings were tenderness in the neck muscles, difficulty in moving neck from side to side, pains along both sides of the spine in the upper part and lower part of the back, normal reflexes, contusions of legs and thighs on both sides. The doctor was of the opinion that Mrs. Richard suffered a whiplash injury of the neck and lumbar and thoracic paravertebral muscle strain. He saw her on November 18, 21, and 28, 1966, and December 13, 1966, and January 10, 1967. Plaintiff was nervous and did not want to return to her prior employment because she did not like her employer. She was again examined in February of 1967 and the doctor found muscle spasms. She was seen on February 24, 1967, and neck traction was prescribed. She was last seen on April 5, 1967. Between February 24 and April 5, 1967, the doctor sent plaintiff to Dr. Thomas Duncan, an orthopedist. On the April 5, 1967, examination, plaintiff had full range of motion and only complained of a slight pulling sensation in the neck. On cross-examination the doctor stated he did not feel plaintiff had suffered serious injuries. He felt that one month after the accident she should be working.

Plaintiff complained of neck pain prior to the injury due to nervousness and tension; pain in February and March of 1967 was due to nervousness and anxiety and not from injury. Her father had suffered

a heart attack, and her son had an illness also, and she did not get along with her employer.

Dr. Duncan: An orthopedist. Saw and examined plaintiff on March 13, 1967. She was referred to him by Dr. Schexnaildre. His opinion was that plaintiff suffered a cervical sprain of the neck and lumbosacral strain of the low back. Plaintiff had good range of motion. No objective findings. No dislocation (subluxation). He recommended the plaintiff return to work.

Dr. Boustany: Physician and surgeon. Saw plaintiff in emergency room on the date of the accident. He found plaintiff to have a mild to moderate sprain of the cervical region. He was of the opinion that plaintiff would be alright in six to eight weeks.

Dr. Webre: Specialist in orthopedic surgery. He examined plaintiff on December 7, 1966. His opinion was that plaintiff suffered a cervical strain of the neck at the time of the accident. Neck movement relatively good; reflexes normal. He felt she suffered strain of neck and back. No subluxation (dislocation).

Dr. Salatich: An orthopedist. He examined plaintiff on May 16, 1967. He found subluxation-dislocation slipping of vertebra between 4 and 5. His opinion was that plaintiff suffered moderate cervical syndrome of whiplash nature and lower back injury. Injuries of a permanent nature.

Dr. Lowrey: A specialist in orthopedic surgery. Examined patient March 28, 1968. Upon examination

he found she had a pre-existing "swayback" defect in the lumbar area and arthritic lipping on C-5 protruding into the C-5 C-6 interspace. These pre-existing defects were probably aggravated by the accident and caused temporary pain. However, at the time of Dr. Lowrey's examination 16 months after the accident, he could find no muscle spasm in either the lumbar or cervical areas. All of his findings were within normal limits except a minor limitation of motion of the neck. Dr. Lowrey said he simply could give no opinion as to whether this was caused by the pre-existing arthritis or by the accident. In any event, it was his recommendation that the plaintiff return to work as a cashier at the foodstore.

The overwhelming preponderance of the expert medical testimony, particularly that of the Board Certified orthopedists, is that plaintiff has recovered and should return to work. In view of the medical testimony, we are of the opinion that the jury in making such a large award abused the large discretion vested in it and that the award in this case should be reduced to $10,000.00.

For pain and suffering we have allowed $6,500.00. Plaintiff testified when she was injured she was earning $84.00 per week as a cashier. Her treating physician testified she could return to work in early April of 1967. We are allowing her 5 months for loss of earning or a total of $1,875.00. Her medical expenses approximated $1,250.00 and damages to her car $350.00. We have rounded all of the above items to the sum of $10,000.00.

For the reasons assigned, the judgment is amended by reducing the jury award from $21,200.00 to $10,000.00 and, as amended, it is affirmed at appellants' cost.

AMENDED AND AFFIRMED.

APPENDIX B

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

No. 2521

MARIE RICHARD,
Plaintiff-Appellee,
versus

LOIS VICKERS CURTIS et al.,
Defendants-Appellants.

Appeal from the Fifteenth Judicial District Court, Parish of Lafayette; Honorable Lucien C. Bertrand, Jr., District Judge, Presiding.

Dissenting Opinion

TATE, Judge.

After a three-day trial, in which the trial judge and jury had an opportunity to observe Mrs. Richard constantly, the trier of fact concluded that she was permanently disabled and awarded her $21,200. No application was made to the trial judge to reduce the verdict as excessive. Yet this court rediagnoses the causes of Mrs. Richard's disability, finds her symptoms of pain imaginary and her undoubted loss of wages unnecessary, and reduces the award in half. On the basis of the cold record and thirty minutes of oral argument, we find she was cured five months after the accident, although without dispute she remained away from work and still was under a doctor's treatment at the time of the trial, some eighteen months after the accident.

1.

Before discussing the record in detail, it may be appropriate to point out an obvious error of law of the majority.

The trial was held almost eighteen months after the accident. At that time, Mrs. Richard had lost *seven thousand dollars wages,* most of which the majority disallows.

Without contradiction the evidence shows that Mrs. Richard had tried to return to work twice but was unable to continue because of complaints of pain. It further shows without contradiction that her attending specialist (Dr. Salatich), who examined and treated her repeatedly between May 16, 1967, and the trial a year later, had advised her to refrain from working

because, due to his diagnosis of her injuries, her work as cashier would cause pain and aggravate her symptoms. Tr. 198-99, 201-2.

Assuming most favorably to the appellant that Dr. Salatich's diagnosis and advice were incorrect, nevertheless the tortfeasor is responsible for these additional damages resulting from the tort-caused personal injury. Where a person has suffered personal injury by reason of another's negligence, the tort feasor is liable for any additional harm and expense caused the injured person by the mistake (or negligence or lack of skill) of the attending doctor. Thibodeaux v. Potomac Insurance Co., La. App. 1st Cir., 201 So.2d 159, 165-67; Hudgens v. Mayeaux, La. App. 3d Cir., 143 So.2d 606, certiorari denied; Kimball v. Audubon Insurance Co., La. App. 1st Cir., 103 So.2d 525; Annotation, 100 ALR 2d 808, 813 (1965); Restatement of Torts 2d, Section 457 (1965); 25 CJS "Damages", Section 20; 22 Am Jur 2d "Damages", Sections 112-14.

2.

In reducing the award, the majority concludes that Mrs. Richard was able to return to work five months after the accident. We base this conclusion on the testimony of several doctors who saw Mrs. Richard only once (as compared with her attending specialist, who saw her frequently over an extended period of time), and most of whom saw her only in the first three or four months following the accident — at a time when, although she was still complaining, the permanence or not of her symptoms could not be evaluated except as a guess.

In holding that the lady's undoubted loss of seven thousand dollars wages was unnecessary (and that her physician erred in his diagnosis recommending that she stay away from work), we overlook that the examining doctors acknowledge that, if indeed the symptoms of pain did persist until the trial some seventeen months later, then they themselves were erroneous in their optimistic assumption in the early days following the accident that the lady's serious injuries[1] were only temporary. Reading the cold record, without benefit of observation of the plaintiff and possibly her pain-lined demeanor and guarded movements, we assume that her symptoms of pain are imaginary or malingered, even though every physician who examined her found at least some objective evidence of them (although perhaps evaluated such residual as temporary or not as intense as that of which the lady complains).

With great respect for my brethren of the majority, the writer feels that once again we are overlooking the primary function of appellate review of quantum. It is not to reduce all awards which appear to us to be high. It is not for ourselves to reevaluate the medical testimony, because we have personal confidence in some specialists and not in others, based on assumptions or knowledge gained from our own experience outside the record and not before the trier of fact.

Once again, because the injury was technically caused by "whiplash", we view the residual as within a category of "whiplash injuries" for which a ten

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[1]The majority recognizes them to be so, in awarding ten thousand dollars for them.

thousand dollar award is appropriate. Because we so categorize it, we disregard this particular plaintiff's permanent crippling as a residual of the accident and this particular plaintiff's loss of seven thousand dollars earnings at the date of the trial (as well as her permanent loss of income of over four thousand dollars a year for the rest of her life).

We were reversed in Lomenick v. Schoeffler, 250 La. 959, 200 So.2d 127, for similarly disregarding substantial medical testimony supporting a jury verdict and for similarly tampering upon appeal with a jury verdict where there was no clear abuse of the great trial court discretion to award general damages for personal injuries, Civil Code Article 1934 (3), after taking into consideration that "each case must be evaluated according to its own peculiar facts and circumstances as to the damage caused by that type of injury." 200 So.2d 129.

3.

The following more detailed analysis of the transcript is for the benefit of the parties and of any higher courts which review this record, since I suppose that upon application for rehearing our tampering with the jury verdict will be attacked as not only erroneous under the law of Louisiana but also as unconstitutionally violating the Seventh Amendment to the United States Constitution. See Hood, Recent Developments: Trial by Jury, 20 Alabama Law Review 76 (1967).

At the risk of being tedious, the writer intends to discuss the medical testimony at length. The 400-page record includes nearly 300 pages of testimony. The majority's short summary of it must of necessity simplify and generalize. However, in the writer's opinion, by so doing important points have been omitted which explain and justify the jury verdict.

For instance, the opinion states simply that Dr. Salatich, the orthopedist, examined the plaintiff on May 16, 1967. It omits description of the circumstance that Dr. Salatich examined and treated her as her attending physician from May, 1967, until April, 1968, when the trial took place, seeing her periodically during this year.

Again, in describing the testimony of Dr. Schexnaildre, the initial attending general practitioner, the opinion notes this amateur psychiatrist's opinion was that the plaintiff's nervousness was the cause of her pain.[2] It also notes his *opinion* that she did not want to return to work because of a disagreement with her em-

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[2]See the doctor's testimony under cross-examination at Tr. 62:

"Q. In your examinations and treatments from November of 1966, on, is it not your opinion or your feeling that the complaints which she was making during these periodic visits were due to the nervousness which she had at that time and which she had had previous to this?"

"A. No, I think she had pain from the accident. Now, from the time of the accident in November, it is my opinion that the pain that she had maybe from February and March and so on was being *aggravated* by her nervousness and anxiety, and I don't think that she should have had pain that long from the injury— *it was my personal opinion.*"

ployer[3] overlooking his further evaluation that, however, "I think she was interested in getting well." Tr. 45.

To recapitulate the facts:

The accident occurred on November 13, 1966. At the time of trial seventeen months later, Mrs. Richard still complained of disabling neck and back pain following exertion, such as housekeeping. She has intermittent spells of painfulness; for instance, five days of neck-ache and back ache, followed by some two-three days of slight pain except upon exertion, then another painful episode of a day or so, etc. In the early days following the injury, she twice tried to return to her job as head cashier at $84.40 per week; she was unable to keep on because of painful aftereffects.

The chief witness testifying to a sound medical basis for her complaints is Dr. Blaise Salatich, an orthopedist. She reported to him for examination and treatment following May 16, 1967 (when, as will be noted,

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[3]Apparently based upon this doctor's impression for treatment of an unrelated illness in 1965, *some two years earlier*, for an unrelated illness. Tr. 65-66. This 40-year-old widow was the sole support of herself and her child. She was a valued employee and her employer was anxious for her to return to work during the Christmas season. After two attempts she was unable to do so. The physician's only comment as to any current disagreement was: "On her visit of December 13, 1966, she stated that she has become very nervous and was having some misunderstanding about work with her boss." Tr. 73. The misunderstanding was that her employer wanted her to return to work, but she had suffered too much pain on her two attempts to feel able to do so.

she had been discharged from further treatment by other physicians).

Based upon observation and upon objective evidence (x-ray evidence of spinal column curvature and of subluxation or displacement of vertebrae), Dr. Salatich concluded that the primary cause of disability was a stretching or tearing of the ligamentous structure about the neck vertebrae which had, through minute internal bleeding, produced permanent scarring which caused pain and a burning sensation through nerve irritation. Tr. 191-95. This also resulted in limitation of motion. He recommended that she restrain her physical activity to avoid pain. Tr. 198. He was of the opinion that this disabling condition resulted from the accident.

The appellants very strongly contend, however, that Dr. Salatich must be mistaken in his diagnosis. They rely upon the allegedly contrary testimony of all other medical witnesses. Initially, the writer was impressed by the contention; but, for reasons to be stated, he does not feel that the other physicians' testimony in context justifies us to modify the jury's award as an abuse of the fact-trier's great discretion in determining general damages.

Dr. C. J. Schexnaildre, a general practitioner, was the initial attending physician. He discharged her on April 5, 1967, some five months later, feeling she could return to work. He thought her pain in March and April was primarily a nervous and emotional aggravation of the physical residual. In February, three months

after the accident, x-rays did show evidence of skeletal spasm in the neck possibly indicative of a more lasting soft tissue injury, Tr. 50, although he thought it might be due to nervous anxiety deepening the symptoms of the trauma, Tr. 51. At the time of discharge, she had a full range of motion of the heck, Tr. 55, but she complained of a pulling sensation of the neck, burning sensations, and the other symptoms which form the basis of Dr. Salatich's diagnosis of a soft-tissue injury. Dr. Schexnaildre did not feel it was a soft-tissue injury because some of the symptoms did not develop until three months later, but he also admitted her symptoms could also have been indicative of nerve damage or ligament damage, Tr. 52, Tr. 50-53, 55.

Dr. Thomas Lee Duncan, an orthopedic surgeon, examined Mrs. Richard once, at the request of Dr. Schexnaildre. This was on March 13, 1967, some four months after the accident. He found the x-ray evidence of what could be muscular spasm of the neck (a straightening of the normal curvature), Tr. 104, as well as evidence of some limitation of motion in the neck, Tr. 102. Because of the lack of other objective manifestations, he felt Mrs. Richard was essentially able to return to work. However (and this is significant for present purposes, in the light of subsequent examinations by other physicians showing greater disability, and in the light of the limited appellate function to test whether there is an abuse of discretion), the doctor also stated that the patient's complaints, if they persisted, were consistent with a soft-tissue injury such as to that which the plaintiff seeks to prove as permanently disabling her. Tr, 89-90, 95-97.

Dr. Fred Webre, an orthopedic surgeon, examined Mr. Richard once, on December 7, 1966, within a month of the injury. While he felt the more probable diagnosis to be cervical strain with only temporary disability, this expert also admitted that the symptoms of which Mrs. Richard complains and their persistence were consistent with a more serious soft-tissue injury, as were the symptoms he observed. Tr. 123-25, 127, 137.

Dr. Michael Boustany, a physician and surgeon, examined Mrs. Richard immediately after the accident in the emergency room of the hospital. He found the cervical sprain injury, but no fracture necessitating immediate hospitalization. He released the patient to return to treatment by her family physician.

It is to be noticed that these latter four doctors examined or treated Mrs. Richard only during the first months after the accident. Three of them saw her only once. They all recognized she had a painful neck injury and a less serious low-back strain, but they all prognosticated she should or would recover, although all of them found symptoms of at least some residual, however slight they felt it. They felt that Mrs. Richard had received what was essentially only a spraining injury to the neck which should eventually cure itself with time, and their essential reason for not diagnosing a more permanent soft-tissue damage was the lack of more pronounced symptoms during the first three months.

However, those of the medical witnesses interrogated on the question admitted that the pain-relieving

drugs prescribed by Dr. Schexnaildre could mask other symptoms to some extent. They also admitted that, if Mrs. Richard's complaints of the persistence, location, and type of pain were valid, she might indeed have sustained a soft-tissue injury producing a more enduring residual.

Of the five medical witnesses so far discussed, only Dr. Salatich had examined or treated Mrs. Richard after her discharge by Dr. Schexnailder in April, 1967. However, on March 28, 1968, immediately before the trial, the defendant obtained an examination of this lady by Dr. Cecil W. Lowry, an orthopedic surgeon.

This examination by Dr. Lowry, some sixteen months after the accident, corroborated Dr. Salatich's findings that some symptoms had persisted and thus indicates that the prognostication of the other four physicians for an earlier cure had proven incorrect. He found x-ray evidence (straightening of the curvature) which by reasonable medical probability was due to muscle spasm, Tr. 260, further admitting that "muscle spasm is secondary to some irritative factor such as lesion of the ligaments or other soft tissue structure in the cervical". Tr. 260. He also found limitation of rotation of the neck. Tr. 262. He then testified that the accident could have been the cause of this neck condition, as well as of activating the low-back defect into painfulness, although he could not say definitely that the accident was the cause. Tr. 260-64. He also stated that this condition could cause painfulness if she attempted to return to work, Tr. 271-72, although he recommended that she try to do so, Tr. 274.

Substantial medical evidence thus tends to prove Mrs. Richard had sustained permanent soft-tissue injuries causing her pain upon exertion, as well as continuously recurrent painful episodes. In the past, awards of from ten to fifteen thousand dollars general damages for pain and suffering resulting from this type of injury have been approved. See Luquette v. Bouillon, La. App. 3d Cir., 184 So.2d 766. Additionally, here Mrs. Richard has sustained a loss of almost seven thousand dollars wages ($84.40 per week, for eighteen months) by the trial, and the future earning capacity of this 40-year-old widow for herself and her child is indefinitely restricted.

Under these circumstances, I cannot say that the trial jury abused its discretion in awarding this plaintiff $21,200. By so tampering with the jury verdict, my esteemed brethren of the majority are unintentionally usurping for this remote appellate tribunal what is properly a function of the trial court (who has seen the witnesses and has had an opportunity to evaluate the sincerity of the patient's complaints of residual pain) to order remittitur upon application for new trial, LSA-CCP Art. 1813. (It is of some interest that no application for remittitur was made by the appellant in the trial court, which could have given the trier of fact the opportunity to express its own evaluation of the verdict, whether or not such application was granted.)

For the reasons too lengthily expressed, the writer respectfully dissents from his brethren's reduction of the trial court's award.

APPENDIX C

Louisiana Constitution, Article 7, Section 29:

"29. *Appellate and supervisory jurisdiction.*

Section 29. Any provision of this Constitution or law to the contrary notwithstanding, the courts of appeal have jurisdiction of the following cases of which the Supreme Court is not given appellate jurisdiction under Article VII, Section 10 of this Constitution; all matters appealed from the family and juvenile courts, except criminal prosecutions against persons other than juveniles; all civil and probate matters of which the district courts throughout the state have exclusive original jurisdiction; and all civil matters involving more than one hundred dollars, exclusive of interest, of which the district courts throughout the state have concurrent jurisdiction.

All appeals of which the courts of appeal have appellate jurisdiction as provided in this Section shall be on both the law and the facts, except where the appeal is limited to questions of law only by any other Section of this Constitution.

Each court of appeal has supervisory jurisdiction, subject to the general supervisory jurisdiction of the Supreme Court, over all in-

ferior courts in all cases in which an appeal would lie to the court of appeal."

Louisiana Constitution, Article 7, Section 41:

"41. *Selection of jurors; women jurors, trial by judge; trial by jury*

Section 41. The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

APPENDIX D

Louisiana Code of Civil Procedure, Articles 1731-1814:

"Article 1731. *Issues triable by jury*

Except as limited by Article 1733, the right of trial by jury is recognized.

The nature and amount of the principal demand shall determine whether any issue in the principal or incidental demand is triable by jury."

"Article 1732. *Demand for jury trial*

A party may demand a trial by jury of any issue triable of right by a jury in a pleading filed not later than ten days after the service of the last pleading directed to such issue."

"Article 1733. *Limitation upon jury trials*

A trial by jury shall not be available in:

(1) A suit demanding less than one thousand dollars exclusive of interest and costs;

(2) A suit on an unconditional obligation to pay a specific sum of money, unless the defense thereto is forgery, fraud, error, want or failure of consideration;

(3) A summary, executory, probate, partition, mandamus, habeas corpus, quo warranto, injunction, curatorship, legitimacy, filiation, separation from bed and board, annulment of marriage, or divorce proceeding;

(4) A proceeding to review an action by an administrative or municipal body; and

(5) All cases where a jury trial is specifically denied by law."

"Article 1734. *Specification of issues*

In his demand a party may specify the issues which he wishes to be tried by jury; otherwise he shall be considered to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party, within ten days after service of the demand or such lesser time as the court may order, may demand trial by jury of any or all of the other issues in the action."

"Article 1735. *Trial of less than all issues; stipulation*

The trial of all issues for which jury trial has been requested shall be by jury unless the parties stipulate that the jury trial shall be as to certain issues only, or unless the right to

trial by jury as to certain issues does not exist, but in all cases there shall be but one trial."

"Article 1751. *Qualification and exemptions of jurors*

The qualification and exemptions of jurors and the method of choosing and summoning the general venire in jury cases are provided by special laws."

"Article 1761. *Procedure in general*

In cases to be tried by jury, twelve jurors summoned in accordance with law shall be chosen by lot to try the case. The method of calling and drawing by lot shall be at the discretion of the court. The parties may stipulate for a lesser number of jurors to try the case; or that if one or more of the jurors dies or becomes disqualified the remaining jurors shall try the case."

"Article 1762. *Swearing of juror before examination*

Every prospective juror, before being examined, shall be sworn to answer truthfully such questions as may be propounded to him."

"Article 1763. *Examination of juror*

The court shall permit the parties or their attorneys to conduct the examination of a prospective juror and may itself conduct an examination, which shall be limited to ascertaining the qualifications of the juror."

"Article 1764. *Peremptory challenges*

Each side is allowed six peremptory challenges. If there is more than one party on any side, the court may allow each side additional peremptory challenges, not to exceed four. Each side shall be allowed an equal number of peremptory challenges. If the parties on a side are unable to agree upon the allocation of peremptory challenges among themselves, the allocation shall be determined by the court before the examination on the voir dire."

"Article 1765. *Challenges for cause*

A juror may be challenged for cause based upon any of the following:

(1) When the juror lacks a qualification required by law;

(2) When the juror has formed an opinion in the case or is not otherwise impartial, the cause of his bias being immaterial;

(3) When the relations whether by blood, marriage, employment, friendship, or enmity between the juror and any party or his attorney are such that it must be reasonably believed that they would influence the juror in coming to a verdict;

(4) When the juror served on a previous jury, which tried the same case or one arising out of the same facts;

(5) When the juror refuses to answer a question on voir dire examination on the ground that his answer might tend to incriminate him."

"Article 1766. *Time for peremptory challenge*

"After the entire jury has been accepted and sworn, no party has the right to challenge peremptorily."

"Article 1767. *Challenging or excusing jurors after acceptance*

Although the entire jury may have been accepted and sworn, up to the beginning of the taking of evidence, a juror may be challenged for cause by either side or be excused either for cause of by consent of both sides, and the panel completed in the ordinary course."

"Article 1768. *Swearing of jurors; selection of foreman*

When the jury has been accepted by all parties, the jurors shall be sworn to try the

case in a just and impartial manner, to the best of their judgment, and to render a verdict according to the law and the evidence. When the jury has retired, the jurors shall select a foreman to preside over them and sign the verdict which they may render.

"Article 1769. *Alternate jurors*

The court may direct that one or two jurors in addition to the regular panel be called and empanelled to sit as alternate jurors. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged when the jury retires to consider its verdict. If one or two alternate jurors are called, each side shall have an equal number of peremptory challenges. The court shall determine how many challenges shall be allowed and shall allocate them among the parties on each side. The additional peremptory challenges may be

used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternate jurors."

"Article 1791. *Time for charging the jury; recordation of charge*

After the trial of the case and the presentation of all the evidence and arguments, the court shall charge the jury in accordance with law. This charge shall be in writing or recorded in the same manner as testimony taken in the case.

"Article 1792. *Contents of charge to jury*

In his charge to the jury the judge shall instruct the jurors on the law applicable to the cause submitted to them, but he shall not recapitulate or comment upon the evidence so as to exercise any influence upon their decisions as to the facts."

"Article 1793. *Instruction to jury; objections*

At the close of the evidence or at an earlier time during the trial as the court reasonably directs, a party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury.

A party may not assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

"Article 1794. *Taking evidence to jury room*

In reaching a verdict the jurors must rely upon their memories, and, when they retire from the jury room to deliberate, they shall not be allowed access to any written evidence or to any notes of the testimony of any witness, but they may take with them any object or document received in evidence which requires a physical examination to enable them to arrive at a just conclusion."

"Article 1795. *Number required for verdict, stipulation*

In order to render any verdict, nine of the jurors must concur therein. The parties may stipulate, however, that the concurrence of a stated majority of the jurors shall be sufficient for a verdict, and must do so when they have stipulated for a trial by a lesser number in accordance with Article 1761."

"Article 1811. *Special verdicts*

The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer, or may submit written forms of the several special findings which might properly be made under the pleadings and evidence, or may use any other appropriate method of submitting the issues and requiring the written findings thereon. The court shall give to the jury such explanation and instruction concerning the matter submitted as may be necessary to enable the jury to make its findings upon each issue. If the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue omitted unless, before the jury retires, he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be presumed to have made a finding in accord with the judgment on the special verdict."

"Article 1812. *General verdict accompanied by answer to interrogatories*

The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explana-

tion or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict.

When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers.

When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict, or may return the jury for further consideration of its answers and verdict, or may order a new trial.

When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers or may order a new trial."

"Article 1813. *Remittitur or additur as alternative to new trial; reformation of verdict*

If the trial court is of the opinion that the verdict is so excessive or inadequate that a

new trial should be granted for that reason only, it may indicate to the party or his attorney within what time he may enter a remittitur or additur. This remittitur or additur is to be entered only with the consent of the plaintiff or the defendant as the case may be, as an alternative to a new trial, and is to be entered only if the amount of the excess or inadequacy of the verdict or judgment can be separately and fairly ascertained. If a remittitur or additur is entered, then the court shall reform the jury verdict or judgment in accordance therewith."

"Article 1814. *New trial on showing of misconduct of jury*

A new trial shall be granted if it be proved that the jury was bribed or has behaved improperly so that impartial justice has not been done"

APPENDIX E

COURT OF APPEAL
THIRD CIRCUIT, STATE OF LOUISIANA

No. 2521

MARIE RICHARD
Plaintiff-Appellee,
versus
LOIS VICKERS, CURTIS, ET AL
Defendants-Appellants.

ON APPEAL FROM THE FIFTEENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF LAFAYETTE, LOUISIANA, HONORABLE LUCIEN C. BERTRAND, DISTRICT JUDGE, PRESIDING

APPLICATION FOR REHEARING ON BEHALF OF MARIE RICHARD

J. MINOS SIMON
Attorney for Plaintiff-Appellee
1408 Pinhook Road
Post Office Box 52116, OCS
Lafayette, Louisiana

COURT OF APPEAL
THIRD CIRCUIT, STATE OF LOUISIANA

No. 2521

MARIE RICHARD
Plaintiff-Appellee,
versus
LOIS VICKERS CURTIS, et al
Defendants-Appellants.

APPLICATION FOR REHEARING

From the judgment of this Court rendered on December 5, 1968, plaintiff, Marie Richard, applies for rehearing, basing her application upon two general propositions: First, she alleges that the Court erroneously reduced the amount of her jury verdict for her injury, pain and suffering, past and prospective; second, she asserts that this Court erroneously reduced the amount awarded to her for her special damages.

THE REDUCTION OF THE AWARDS IS UNCONSTITUTIONAL

Plaintiff first asserts that Amendment Seven of the United States Constitution provides for trial by jury in civil cases, and that the verdict of the jury may not thereafter be examined on appeal except in accordance with the rules of common law.

As stated by this Court in its decision in *Broussard v. State Farm Mutual Automobile Insurance Company*, 188 So.2d 111, the evaluation of the evidence performed independently by this Court on appeal is contrary to common law rules and is violative of the Constitution, if Amendment Seven has been applicable to the States

by reason of the subsequent adoption of Amendment Fourteen, or otherwise.

Plaintiff further avers that the ruling of this Court likewise is contrary to her right to due process of law under Amendments Five and Fourteen of the United States Constitution, and of equal justice under the law as guaranteed her by Amendment Fourteen.

Amendment Seven contains two distinct clauses, the first preserving the right to trial by jury in civil cases, and the second providing that no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of common law. These two provisions were declared to be severable in *Parsons v. Bedford*, 28 U.S. 433, and although numerous cases more than 40 years old have construed the first portion of Amendment Seven as not being applicable to the States, no known court decision has yet so held with respect to the second portion of Amendment Seven. In fact, the entire matter of applicability of Amendment Seven to the States has been dormant for the last 40 years until recently, and a grant of certiorari by the United States Supreme Court in *Heider v. Michigan Sugar Co.*, 375 Mich. 490, 134 N.W. (2d) 637, affords reason for belief that the Court is about to bring the provisions of Amendment Seven in line with the provisions of the remainder of the first nine amendments to the United States Constitution, all of which have been held to be applicable to the States as a consequence of Amendment Fourteen.

The only United States Supreme Court decision concerning a Louisiana law was *Walker v. Sauvinet*, 92

U.S. 90, upholding a Louisiana statute that had provided that in the event of the failure of the jury to agree, the Court might render a decision on the same evidence, but the statute neither permitted verdicts to be overturned by appellate review of fact nor did it permit judges to substitute their findings for those of the jury. Obviously, this did not relate to the second portion of Amendment Seven, and in view of subsequent decisions relating to the other said amendments, it is suggested that *Walker* is no longer good law.

It was held in *Brady v. Southern Railway Co.*, 320 U.S. 476:

> The fact that fair-minded men might reach different conclusions, emphasizes the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue . . . as well as issues involving contraverted evidence . . . To withdraw such a question from the jury is to usurp its functions.
>
> The right to trial by jury is a basic and fundamental feature of our system of Federal jurisprudence . . . Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply these standards to the facts of these personal injuries.

In *Lavender v. Kurn*, 327 U.S. 645, it was said, "It is no answer to say that the jury's verdict involved

speculation and conjecture . . . Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."

The same Court, in *Rogers v. Missouri Pacific Railway Co.*, 352 U.S. 500, held it important to grant certiorari "when lower Federal and State Courts persistently deprived litigants of their right to a jury determination."

It has been many times before this Court that if Amendment Fourteen causes any portion of the first ten amendments to be applicable to the States, it must necessarily follow that it has the same effect on all of them. Following the adoption of Amendment Fourteen, it was first held for many years that Amendments One through Eight had no application to the States, but this rule subsequently began to give way as the Supreme Court made selective holdings respecting various guarantees expressed in the first eight amendments. With respect to Amendment One, the matter is reviewed in *Abbington School District v. Schempt*, 374 U.S. 203.

Decisions in recent years, such as *Mapp v. Ohio*, 367 U.S. 643, have applicable, by reason of Amendment Fourteen portions of all of the first nine amendments, except Amendment Seven.

With respect to trial by jury, it was held in *Jacob v. New York City*, 315 U.S. 752, "A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously

guarded by the courts." And in a dissenting opinion in *Green v. United States,* 356 U.S. 165, the following appears:

> The Fifth, Sixth, Seventh and Eighth Amendments were directly and purposefully designed to confine the power of courts and judges . . .
>
> As manifested by the Declaration of Independence, the denial of trial by jury and its subversion by various contrivances was one of the principal complaints against the English Crown. Trial by a jury of laymen and no less was regarded as the birthright of free men.

Trial by jury and habeas corpus are the two foundations upon which all personal liberty rests. Without them, the law, both written and unwritten, means no more and no less than what a court at a particular time may say that it means. That habeas corpus also is of English origin does not render it any less valuable to citizens of Louisiana, and it may suggested with considerable basis in fact that any reluctance on the part of this State to adopt the entire common law concept of trial by jury and limitation on appellate review rests almost wholly with the judges, and not with the citizens of this State who, given free opportunity, would undoubtedly agree with Blackstone:

> The trial by jury is looked upon as the glory of the English law . . . an advantage in regulating the civil property . . . the most transcendent privilege, which any subject can enjoy, or wish for, that he cannot be affected ei-

ther in his property, his liberty, or his person, but by the unanimous consent of 12 of his neighbors and equals . . . Because Rome, Sparta and Carthage have lost their liberties, therefore those of England in time must perish. But it must be recollected, that those states, at the time when their liberties were lost, were strangers to the trial by jury.

. . . . . .

If (the impartial administration of justice) be entirely entrusted to the magistry, a select body of men, usually chosen . . . by parties holding the highest offices in the State, their decisions will freqently have an involuntary bias toward those of their own rank and dignity; for it is not to be expected, that the few should be always attentive to the interest and the good of the many.

. . . . . .

This, therefore, preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachment of the more powerful and wealthy citizens.

Consequently, plaintiff urges this Court that the findings of the jury are final and cannot be reviewed by the Court so long as there is a reasonable basis for the finding of the jury.

THE REDUCTION OF THE AWARD FOR INJURIES

After a long appeal fight marked with some success beginning with *Gaspard v. LeMaire,* 245 La. 239, 158 So.2d 149 (1963), to *Lomenick v. Paul H. Schoeffler,* 250 La. 959, 200 So.2d 127, our Louisiana State Supreme Court has laid down a firm mandate to the Appellate Courts that (Lomenick, supra, at page 129):

> "* * * a type of injury has little significants for determining the amount of damages, but that each case must be evaluated according to its own parculiar facts and circumstances as to damage caused by that type of injury."

The Supreme Court enunciated at page 132:

> "* * * in their examination of the facts these Courts must give effect to the basic law set out in Article 1934(3) of our Civil Code that in the assessment of damages in cases of offenses and quasi offenses 'much discretion must be left to the judge or jury'. This law is plain and means what is says, and it is the duty of all appellate courts to follow it. Under this rule the amount of damages assessed by the judge or jury should not be disturbed unless the appellate court's examination of the facts reveals a clear abuse of the discretion vested in the lower court."

To simply state that the jury in making such a large award abused the large discretion vested in it and that

the award in this case should be reduced to $10,000.00 we do not believe meets the criteria set by the State Supreme Court. A critical analysis of the medical testimony as outlined in our original brief and as delineated in Judge Tate's dissenting brief, certainly in our opinion does not substantiate the statement that the jury abused the large discretion vested in it. We feel strongly that this case is similar to the *Lomenick* case and that the conclusion of the Supreme Court in *Lomenick* is applicable here and we quote that conclusion at page 132 in *Lomenick:*

> "The facts and circumstances of this case do not reveal that the jury abused its discretion in awarding relator $10,000.00 as damages for his injury. The facts and circumstances in the other neck injury cases involving much smaller awards, relied upon by respondent showing that this award was all out of proportion with previous awards for similar injuries, caused them to have little or no relevancy for the purpose of demonstrating the excessiveness of this award."

Though in the instant decision appealed from this Court made no mention of cases compared, which it cannot do, it erroneously arrived at the conclusion that plaintiff had recovered within five months of the injury. Certainly the facts and circumstances of this case do not support such a conclusion.

As so aptly stated by Judge Tate in his dissenting opinion, the majority based its conclusion that Mrs.

Richard was able to return to work five months after the accident on testimony of doctors who saw her only once each and for the most part in the first three or four months following the accident "at a time when, although she was still complaining, the permanence or not of her symptoms could not be evaluated except as a guess." The testimony of her attending specialist in orthopedic surgery, Dr. Blaise Salatich, who saw her frequently over an extended period of time, was totally ignored though our jurisprudence is replete with cases holding that the treating physician is ordinarily entitled to greater weight. No reason was assigned why this principle wasn't given effect in this case.

It is somewhat difficult to accept the conclusion of the majority when Dr. Thomas Lee Duncan, an orthopedic surgeon, examined Mrs. Richard once at the request of her then attending physician, Dr. Schexnider, on March 13, 1967, approximately four months post-trauma. Dr. Duncan found x-ray evidence of what could be muscular spasm of the neck as demonstrated by a straightening of the normal curvature (transcript page 104), as well as limitation of motion in the neck. Dr. Duncan also stated that the patient's complaints, if persisting, were consistent with a soft tissue injury as described by her (transcript page 89-90, 95-97). These findings in this testimony certainly is not overwhelmingly convincing that Mrs. Richard had recovered at that time.

Dr. Fred C. Webre, another orthopedic surgeon, examined Mrs. Richard only once on December 7, 1966, shortly after the injury. Though he had a probable

diagnosis of a cervical strain with only temporary disability, Dr. Webre admitted that the symptoms complained of by Mrs. Richard, which persisted, were consistent with a more serious soft tissue injury (transcript pages 123-125, 127, 137). Certainly this is not overwhelming medical testimony that Mrs. Richard was fully recovered at that time.

Immediately after the accident plaintiff was seen by Dr. Michael Boustany, a physician and surgeon, who found and diagnosed a cervical sprain injury, no fractures, and he released her to return to treatment by her family physician. Certainly this is not overwhelming medical testimony that she had recovered at that examination.

Dr. Cecil W. Lowry, an orthopedic surgeon, examined plaintiff on March 28, 1968, immediately before the trial, for trial purposes and certainly his testimony is not overwhelming medical testimony that Mrs. Richard had recovered at the end of five months since the accident had occurred on November 13, 1966. However it is rather illuminating to examine the testimony of Dr. Lowry as to the condition of Mrs. Richard on March 28, 1968. He found x-ray evidence of straightening of the cervical curvature which by reasonable medical probability was due to muscle spasm (transcript page 260); Dr. Lowry further admitted that muscle spasm is secondary to some irritative factor such as lesion of ligaments or other soft tissue structures in the cervical spine (transcript page 260). Dr. Lowry found limitation of motion in the neck (transcript page 262), and further testified that

the accident could have been the cause of the neck condition as well as of precipitating symptoms in the low back because of the defect present. Dr. Lowry was further of the opinion that plaintiff's condition could cause pain if she attempted to return to work (transcript pages 271-72) although he recommended that she should try to do so (transcript page 274). Again this is certainly not overwhelming medical testimony that Mrs. Richard was recovered even on March 28, 1968.

The "overwhelming medical testimony" eludes us particularly when we examine the testimony of Dr. Schexnaildre, the only other doctor who saw Mrs. Richard besides Dr. Salatich. The note of evidence discloses that Dr. Schexnaildre saw Mrs. Richard for the last time on April 5, 1967.

As recited in our original brief, between February and April Dr. Schexnaildre spoke with plaintiff on numerous occasions and Mrs. Richard continued to register the same general complaints which characterized her condition at all times prior thereto since the occurrance of the accident. Again on this last occasion when he saw her, she complained of pulling sensation in the neck upon engaging the neck in certain motions. Dr. Schexnaildre though this condition was due to muscle spasm secondary to the injury (transcript page 55). She still complained of a burning sensation around the seventh cervical vertebra as she had done previously. Dr. Schexnaildre discontinued seeing Mrs. Richard not because she was completely recovered, but because there was nothing more he could do

for her than to prescribe muscle relaxants, traction, and analgesics. As quoted previously, the following summarizes his attitude (transcript page 56):

> "Q. Did you feel that you could do anything further for her at that time?
> A. No, I didn't feel that I could at all, and I explained that to Mrs. Marie. I explained that to her before I sent her to Dr. Duncan.
> Q. What more can be done, doctor, for a person who has soft-tissue injury of the cervical and lumbar areas than give them muscle relaxants and traction treatment and analgesics. What more can be done really?
> A. That's all.
> Q. And that only palliates it - that does not cure it - that only helps to relieve the symptoms, isn't that true?
> A. I would say so."

Certainly this is not "overwhelming medical testimony".

The Court is familiar with the attempt to bias Dr. Lowry in an effort to impeach Dr. Salatich as evidenced by the letter written to Dr. Lowry by Mr. J. J. Davidson, III. Certainly the Court should also be familiar with the testimony of Dr. Lowry at pages 260 and 261 of the transcript and quoted on page 19 of our original brief.

Dr. Salatich's testimony, supported by the unquestionably favorable testimony of the other doctors, was

to the effect that Mrs. Richard had sustained a tearing of the ligamentous, musculo-fascial and peri-articular and capsular soft tissue structures overlying and adjacent to the cervical vertebrae, more outstanding on the right side and that she had sustained a similar type injury to the lower back, primarily the lumbo-sacral area. It was his further view that her injuries were of a permanent nature and have been and continue to be disabling. X-ray evidence by comparison of x-rays shortly after the accident and six months later demonstrated conclusively degenerate changes secondary to the injuries initially incurred by plaintiff. Dr. Salatich was also of the opinion (transcript page 201) that Mrs. Richard is unable to return to her gainful employment. The great preponderance of the medical testimony is in favor of plaintiff.

REDUCTION OF AWARD FOR SPECIALS

In view of the medical evidence, it is respectfully urged that the reduction of the loss of earnings should be restored. But even assuming that the medical is not in her favor, plaintiff is entitled to recover for her specials as demonstrated by Judge Tate in his dissenting opinion as follows:

> "Assuming most favorably to the appellant that Dr. Salatich's diagnosis and advice were incorrect, nevertheless the tort feasor is responsible for these additional damages resulting from the tort-caused personal injury. Where a person has suffered personal injury by reason of another's negligence, the tort feasor is

liable for additional harm and expense caused the injured person by the mistake (or negligence or lack of skill) of the attending doctor. Thibodeaux v. Potomac Insurance Co., La. App. 1st Cir., 201 So.2d 159, 165-67; Hudgens v. Mayeaux, La. App. 3d Cir., 143 So.2d 606, certiorari denied; Kimball v. Audubon Insurance Co., La. App. 1st Cir., 103 So.2d 525; Annotation, 100 ALR 2d 808, 813 (1965); Restatement of Torts 2d, Section 457 (1965); 25 CJS 'Damages', Section 20; 22 Am Jur 2d 'Damages', Sections 112-14."

What more can be said on this issue? There is no question that her treating physician, Dr. Salatich, a specialist in orthopedic surgery, advised plaintiff not to return to work because of her pain and suffering. It is equally clear as to the jurisprudence on this question.

CONCLUSION

It is an inescapable conclusion that the majority erred in tampering with the jury verdict as the record shows inarguably that the jury did not abuse their great discretion.

It is further an inescapable conclusion that the ruling of this Court complained of has deprived plaintiff of due process of law and of equal justice, has deprived her of the right to trial by jury, unconstitutionally denied her the guarantees contained in Amendments Five, Seven and Fourteen of the United States Con-

stitution and was an illegal usurpation on the part of this Court of the function of the jury.

Plaintiff respectfully urges that rehearing should be granted in order that the errors of this Court may be corrected.

J. MINOS SIMON
Attorney for Plaintiff
1408 Pinhook Road
Post Office Box 52116, OCS

(Signed) JOHN RIXIE MOUTON
John Rixie Mouton

CERTIFICATE

I certify that a copy of the foregoing has this day been mailed to Mr. J. J. Davidson, III, Attorney for Defendants, Post Office Drawer 3507, Lafayette, Louisiana.

Lafayette, Louisiana, this 16th day of December, 1968.

(Signed) JOHN RIXIE MOUTON

APPENDIX F

IN THE
LOUISIANA SUPREME COURT
DOCKET NUMBER _____

STATE OF LOUISIANA, EX REL.,
MARIE P. RICHARD

versus

COURT OF APPEAL, THIRD CIRCUIT

In the Matter of:

Marie P. Richard
versus
Travelers Insurance Co., et al

Fifteenth Judicial District Court
No. 39,779
Parish of Lafayette, Louisiana

ON APPLICATION FOR WRITS OF CERTIORARI, MANDAMUS AND PROHIBITION TO THE COURT OF APPEAL OF LOUISIANA, THIRD CIRCUIT

J. MINOS SIMON
1408 Pinhook Road
Post Office Box 52116, OCS
Lafayette, Louisiana

ATTORNEY FOR
PLAINTIFF, APPELLEE

INDEX

Page

JURISDICTION 75

STATEMENT OF THE CASE 75

ASSIGNMENT OF ERRORS 77

REASONS FOR GRANTING WRITS

Error No. 1: It was error for respondent court to have modified downward a jury verdict in favor of relatrix, where a fair contextual evaluation of all the medical evidence demonstrates that relatrix sustained permanently disabling injuries accompanied by a loss of past earnings and property damage in excess of $7,000.00 plus anticipated loss of earnings 77

Error No. 2: It was error for respondent court to have reduced the judgment as to past loss of earnings, where relatrix refrained from engaging in gainful employment on the advice of her treating physician .. 115

Error No. 3: The re-examination by respondent court of the jury findings and modification of its award, where no application for remittitur was made in the trial court, deny relatrix of her constitutional rights secured to her by the Fifth, Seventh and Fourteenth Amendments to the United States Constitution 116

CONCLUSION 130

PROOF OF SERVICE 136

TO THE HONORABLE, THE CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE LOUISIANA SUPREME COURT:

The State of Louisiana, on the relation of MARIE P. RICHARD, applying for writs of certiorari, mandamus and prohibition to review and eventually to reverse the decision of the Court of Appeal, Third Circuit, State of Louisiana, finally rendered on January 10, 1969, in connection with the captioned matter, respectfully represents that:

JURISDICTION

The captioned proceeding involves a civil action for damages and the action of the respondent court in the exercise of its appellate jurisdiction in reducing by more than fifty (50) percent the award of the jury in favor of relatrix. Thus this is a case falling within the supervisory jurisdiction of this court as ordained by the provisions of Article 7, Section 10 of the Louisiana Constitution.

STATEMENT OF THE CASE

Relatrix, Marie P. Richard, a widow for more than ten (10) years, charged with the burden of raising and providing for a minor son, now seventeen (17) years old, became the victim of an automobile collision on November 13, 1966. She sustained permanently disabling injuries as a result of this accident, consisting of tearing and stretching type trauma to the soft tissue structures of her cervical and lumbar spine, including

such structures as the ligaments and nerve sheets of nerve roots, as well as an aggravation of previously existing, nondisabling and quiescent boney anomalies of her lower back. These injuries disabled her from engaging in her occupational duties from the date of their onset to the date of trial, with a concomitant loss of wages of Seven Thousand ($7,000.00) Dollars and an expected future loss of wages for an indefinite period of time into the future. She further sustained medical expenses in the amount of Five Hundred Forty One and 71/100 ($541.71) Dollars plus necessary telephone expenses of Thirty Six and 62/100 ($36.62) Dollars.

In due course relatrix filed the captioned lawsuit. All issues of fact were tried to a jury. The jury returned a verdict in favor of relatrix in the sum of Twenty One Thousand Two Hundred ($21,200.00) Dollars. In due course judgment in the amount of the verdict was granted. Defendants, without ever seeking remittitur or complaining of any error of law, appealed this judgment to the Court of Appeal, Third Circuit, respondent court herein.

On December 5, 1968, respondent Court of Appeal by a two to one decision reduced the jury award to the sum of Ten Thousand ($10,000.00) Dollars and otherwise affirmed the judgment. Dissenting Appellate-Judge Tate assigned written reasons for his dissent. Timely application for rehearing was filed and on January 10, 1969, by a divided court it was denied, Judge Tate again dissenting and Judge Miller voting for granting rehearing.

ASSIGNMENT OF ERRORS

1. It was error for respondent court to have modified downward a jury verdict in favor of relatrix, where a fair contextual evaluation of all the medical evidence demonstrates that relatrix sustained permanently disabling injuries accompanied by a loss of past earnings and property damage in excess of Seven Thousand ($7,000.00) Dollars plus anticipated loss of earnings.

2. It was error for respondent court to have reduced the judgment as to past loss of earnings, where relatrix refrained from engaging in gainful employment on the advice of her treating physician.

3. The re-examination by respondent court of the jury findings and modification of its award, where no application for remittitur was made in the trial court, deny relatrix of her constitutional rights secured to her by the Fifth, Seventh and Fourteenth Amendments to the United States Constitution.

REASONS FOR GRANTING WRITS

Error No. 1

IT WAS ERROR FOR RESPONDENT COURT TO HAVE MODIFIED DOWNWARD A JURY VERDICT IN FAVOR OF RELATRIX, WHERE A FAIR CONTEXTUAL EVALUATION OF ALL THE MEDICAL EVIDENCE DEMONSTRATES THAT RELATRIX SUS-

TAINED PERMANENTLY DISABLING INJURIES ACCOMPANIED BY A LOSS OF PAST EARNINGS AND PROPERTY DAMAGE IN EXCESS OF $7,000.00 PLUS ANTICIPATED LOSS OF EARNINGS

Heavily laden by the arduous task of seeking justice through the noble and time-honored tradition of trial by jury, Marie P. Richard appears before this court buoyed by the same hope and faith that sustained Mrs. Gaspard in *Gaspard v. LeMaire,* 245 La. 239, 158 So.2d 149, and Mr. Lomenick in *Lomenick v. Schoeffler,* 250 La. 959, 200 So.2d 127, in the conviction that the irrepressible doctrine, that in the assessment of damages a large discretion must be left to the triers of facts, will be again vindicated, to the end that the wergild system will find no roots in the jurisprudence of this state. Because of GASPARD and LOMENICK it would seem that relatrix's burden should be less than that of her predecessors. This ostensible postulate, however, is advanced only timorously in view of the fact that the organ of the opinion of the respondent appellate court does not appear to be agreeably inclined to heed the lessons of GASPARD and LOMENICK, witness the lament of Judge Tate, recorded in his dissent:

> "We were reversed in Lomenick v. Schoeffler, 250 La. 959, 200 So.2d 127, for similarly disregarding substantial medical testimony supporting a jury verdict and for similarly tampering upon appeal with a jury verdict where there was no clear abuse of the great trial

court discretion to award general damages for personal injuries, Civil Code, Article 1934 (3), after taking into consideration that 'each case must be evaluated according to its own peculiar facts and circumstances as to the damage caused by that type of injury'."

The majority opinion complained of has a surface glamour of persuasion. But this gloss is betrayed by a contextual reading and evaluation of the medical evidence. When the evidence as a whole is fairly evaluated there remains little or no support that the jury abused its "great discretion" in assessing damages in the amount of Twenty One Thousand Two Hundred ($21,200.00) Dollars. especially where due consideration is given to the undisputed fact that relatrix suffered damages in loss of wages alone in an amount in excess of Seven Thousand ($7,000.00) Dollars.

Judge Tate's analytical exposure of the opinion of the respondent court convincingly establishes its erroneous nature and points to the impelling reasons for a grant of review. In his dissent Judge Tate observes:

* * * *

"Once again, because the injury was technically caused by 'whiplash', we review the residual as within a category of 'whiplash injuries' for which a ten thousand dollar award is appropriate. Because we so categorize it, we disregard this particular *plaintiff's permanent crippling* as a residual of the accident and

this particular plaintiff's loss of seven thousand dollars earnings at the date of the trial (as well as her permanent loss of income of over four thousand dollars a year for the rest of her life).

* * * *

"At the risk of being tedious, the writer intends to discuss the medical testimony at length. The 400-page record includes nearly 300 pages of testimony. The majority's short summary of it must of necessity simplify and generalize. However, in the writer's opinion, by so doing important points have been omitted which explain and justify the jury verdict.

"For instance, the opinion states simply that Dr. Salatich, the orthopedist, examined the plaintiff on May 16, 1967. It omits the description of the circumstances that Dr. Salatich examined and treated her as her attending physician from May, 1967, until April, 1968, when the trial took place, seeing her periodically during this year.

"Again, in describing the testimony of Dr. Schexnaildre, the initial attending general practitioner, the opinion notes this amateur psychiatrist's opinion was that the plaintiff's nervousness was the cause of her pain. It also notes his *opinion* that she did not want to return

to work because of a disagreement with her employer, overlooking his further evaluation that, however, 'I think she was interested in getting well.' Tr. 45.

"To recapitulate the facts:

"The accident occurred on November 13, 1966. At the time of trial seventeen months later, Mrs. Richard still complained of disabling neck and back pain following exertion, such as housekeeping. She has intermittent spells of painfulness; for instance, five days of neck-ache and back ache, followed by some two-three days of slight pain except upon exertion, then another painful episode of a day or so, etc. In the early days following the injury, she twice tried to return to her job as head cashier at $84.40 per week; she was unable to keep on because of painful aftereffects.

"The chief witness testifying to a sound medical basis for her complaints is Dr. Blaise Salatich, an orthopedist. She reported to him for examination and treatment following May 16, 1967 (when, as will be noted, she had been discharged from further treatment by other physicians).

"Based upon observation and upon objective evidence (x-ray evidence of spinal column curvature and of subluxation or displacement of vertebrae), Dr. Salatich concluded

that the primary cause of disability was a stretching or tearing of the ligamentous structure about the neck vertebrae which had, through minute internal bleeding, produced permanent scarring which caused pain and a burning sensation through nerve irritation. Tr. 191-95. This also resulted in limitation of motion. He recommended that she restrain her physical activity to avoid pain. Tr. 198. He was of the opinion that this disabling condition resulted from the accident.

"The appellants very strongly contend, however, that Dr. Salatich must be mistaken in his diagnosis. They rely upon the allegedly contrary testimony of all other medical witnesses. Initially, the writer was impressed by the contention; but, for reasons to be stated, he does not feel that the other physicians' testimony context justifies us to modify the jury's award as an abuse of the fact-trier's great discretion in determining general damages.

"Dr. C. J. Schexnaildre, a general practitioner, was the initial attending physician. He discharged her on April 5, 1967, some five months later, feeling she could return to work. He thought her pain in March and April was primarily a nervous and emotional aggravation of the physical residual. In February, three months after the accident, x-rays did show evidence of skeletal spasm in the neck, possibly indicative of a more lasting soft tis-

sue injury, Tr. 50, although he thought it might be due to nervous anxiety deepening the symptoms of the trauma, Tr. 51. At the time of discharge, she had a full range of motion of the neck, Tr. 55, but she complained of a pulling sensation of the neck, burning sensations, and the other symptoms which form the basis of Dr. Salatich's diagnosis of a soft-tissue injury. Dr. Schexnaildre did not feel it was a soft-tissue injury because some of the symptoms did not develop until three months later, but he also admitted her symptoms could also have been indicative of nerve damage or ligament damage, Tr. 52, Tr. 50-53, 55.

"Dr. Thomas Lee Duncan, an orthopedic surgeon, examined Mrs. Richard once, at the request of Dr. Schexnaildre. This was on March 13, 1967, some four months after the accident. He found the x-ray evidence of what could be muscular spasm of the neck (a straightening of the normal curvature), Tr. 104, as well as evidence of some limitation of motion in the neck, Tr. 102. Because of the lack of other objective manifestations, he felt Mrs. Richard was essentially able to return to work. However (and this is significant for present purposes, in the light of subsequent examinations by other physicians showing greater disability, and in the light of the limited appellate function to test whether there is an abuse of discretion), the doctor also stated that the patient's complaints, if they persisted, were con-

sistent with a soft-tissue injury such as to that which the plaintiff seeks to prove as permanently disabling her. Tr. 89-90, 95-97.

"Dr. Fred Webre, an orthopedic surgeon, examined Mrs. Richard once, on December 7, 1966, within a month of the injury. While he felt that more probable diagnosis to be cervical strain with only temporary disability, this expert also admitted that the symptoms of which Mrs. Richard complains and their persistence were consistent with a more serious soft-tissue injury, as were the symptoms he observed. Tr. 123-25, 127, 137.

"Dr. Michael Boustany, a physician and surgeon, examined Mrs. Richard immediately after the accident in the emergency room of the hospital. He found the cervical sprain injury, but no fracture necessitating immediate hospitalization. He released the patient to return to treatment by her family physician.

"It is to be noticed that these latter four doctors examined or treated Mrs. Richard only during the first months after the accident. Three of them saw her only once. They all recognized she had a painful neck injury and a less serious low-back strain, but they all prognosticated she should or would recover, although all of them found symptoms of at least some residual, however slight they felt it. They felt that Mrs. Richard had received what

was essentially only a spraining injury to the neck which should eventually cure itself with time, and their essential reason for not diagnosing a more permanent soft-tissue damage was the lack of more pronounced symptoms during the first three months.

"However, those of the medical witnesses interrogated on the question admitted that the pain-relieving drugs prescribed by Dr. Schexnaildre could mask other symptoms to some extent. They also admitted that; if Mrs. Richard's complaints of the persistence, location, and type of pain were valid, she might indeed have sustained a soft-tissue injury producing a more enduring residual.

"Of the five medical witnesses so far discussed, only Dr. Salatich had examined or treated Mrs. Richard after her discharge by Dr. Schexnaildre in April, 1967. However, on March 28, 1968, immediately before the trial, the defendant obtained an examination of this lady by Dr. Cecil W. Lowry, an orthopedic surgeon.

"This examination by Dr. Lowry, some sixteen months after the accident, corroborated Dr. Salatich's findings that some symptoms had persisted and thus indicates that the prognostication of the other four physicians for an earlier cure had proven incorrect. He found x-ray evidence (straightening of the curva-

ture) which by reasonable medical probability was due to muscle spasm, Tr. 260, further admitting that 'muscle spasm is secondary to some irritative factor such as lesion of the ligaments or other soft tissue structure in the cervical'. Tr. 260. He also found limitation of rotation of the neck. Tr. 262. He then testified that the accident could have been the cause of this neck condition, as well as of activating the low-back defect into painfulness, although he could not say definitely that the accident was the cause. Tr. 260-64. He also stated that this condition could cause painfulness if she attempted to return to work, Tr. 271-72, although he recommended that she try to do so. Tr. 274.

"Substantial medical evidence thus tends to prove Mrs. Richard had sustained permanent soft-tissue injuries causing her pain upon exertion, as well as continously recurrent painful episodes. In the past, awards of from ten to fifteen thousand dollars general damages for pain and suffering resulting from this type of injury have been approved. See Luquette v. Bouillon, La.App. 3d Cir., 184 So.2d 766. Additionally, here Mrs. Richard has sustained a loss of almost seven thousand dollars wages ($84.40 per week, for eighteen months) by the trial, and the future earning capacity of this 40-year-old widow for herself and her child is indefinitely restricted.

"Under these circumstances, I cannot say that the trial jury abused its discretion in awarding this plaintiff $21,200. By so tampering with the jury verdict, my esteemed brethren of the majority are unintentionally usurping for this remote appellate tribunal what is properly a function of the trial court (who has seen the witnesses and has had an opportunity to evaluate the sincerity of the patient's complaints of residual pain) to order remittitur upon application for new trial, LSA-CCP Art. 1813. (It is of some interest that no application for remittitur was made by the appellant in the trial court, which could have given the trier of fact the opportunity to express its own evaluation of the verdict, whether or not such application was granted.)"

Further detailed analysis of the medical evidence is appropriate to an understanding of the grievous error committed by the court in its holding that the jury had abused its great discretion in assessing damages.

For a period of approximately four months Dr. C. J. Schexnaildre, whom Mrs. Richard saw the day following the accident, functioned as her treating physician. On initial examination Dr. Schexnaildre generalized his findings as follows: - Tr. 31

"The positive findings were tenderness in the neck muscles in the back of the neck, she had trouble moving her head from side to side — would elicit pain — she had pains down

> along both sides on the spine in the upper part of the back and also in the lower part of the back, she had multiple small areas of hemorrhage, which we call contusions of the legs and thighs on both sides, apparently from being bounced around in the automobile. Although all of her reflexes were normal, she was just having the neck and back pain."

In testifying before the jury Dr. Schexnaildre proceeded to describe the gross anatomical nature and components of the spine by drawing the jurors attention to the fact that there are multiple joints of the spinal column and that the integrity of these joints were maintained by ligamentous and capsular structures adjacent to these bony segments. After describing this to the jury Dr. Schexnaildre was asked to describe what he meant by his previous testimony that in his opinion Mrs. Richard had sustained a whiplash type injury. In responding Dr. Schexnaildre explained to the jury what happens to these bony segments and the soft tissue structures surrounding them as follows: (Tr. 34)

> "Well, it usually results from some force that causes the head to whip either to the side or back, and this sudden whipping causes sometimes a tear in the ligaments supporting the vertebrae - it can cause severe muscle strain - it can cause some hemorrhage sometimes in the muscles, depending upon the severity of it."

Then Dr. Schexnaildre was asked what happens when these anatomical components of the cervical spine are injured and his response was: (Tr. 35)

"Well, you usually have pain - severe pain - tenderness to palpation to feeling and touch, painful motion, movement.

Q. How about muscle spasm?

A. Muscle spasm?

Q. In other words, your muscles go into spasm when you have that type injury?

A. That's right.

Q. Did you find this to exist when you examined Mrs. Richard on this occasion?

A. Yes, I did.

Q. And this finding is not limited only to the neck - I think you said the thoracic area?

A. That's right.

Q. And the lower lumbar area?

A. In fact, the first visit I saw her, she said she was hurting - she just hurt all over, and, of course, the pain was localized to the neck and back - at least most of her complaints."

Then Dr. Schexnaildre was asked whether or not upon examining her he suspected that Mrs. Richard had sustained the type injury which had been under discussion up to that point. The following exemplifies the colloquy on that question: (Tr. 35)

"Q. Did you suspect then that she had some kind of injury to the soft tissue structures on this occasion when you saw her?

A. Yes sir.
Q. Were her complaints consistent with that type injury?
A. Yes.
Q. Did you suspect the same type injury to the lower part of her back?
A. Yes, I suspected a strain."

Dr. Schexnaildre stated that on this occasion he prescribed muscle relaxants and some analgesics to relieve her pain. When he was asked what was the purpose of giving her something to relax her muscles he responded: "To stop her muscle spasm associated with the injury." (Tr. 36) Dr. Schexnaildre further advised that the drugs which he prescribed had no curative effect but were only palliative in nature. Only "mother nature" Dr. Schexnaildre advised could have any curative effect on this type injury. And Dr. Schexnaildre advised that nature's healing process results in scarring of these tissues and once scarring takes place according to Dr. Schexaildre "the scar is permanent, yes." (Tr. 37)

According to Dr. Schexnaildre it is characteristic of this type injury that the signs of its existence will come and go from time to time. (Tr. 38)

His next examination of Mrs. Richard occurred on November 18, 1966. X-rays made on this occasion demonstrated that Mrs. Richard was experiencing curvature of the spine which Dr. Schexnaildre attributed to muscle spasm secondary to soft-tissue structure injury. Dr. Schexnaildre further testified that he saw

Mrs. Richard on November 21 and that she registered generally the same complaints and expanded on them by expressing complaints of stiffness and sore muscles on arising in the morning and pain across her shoulders. As to this he was asked whether this type symptomatology is to be expected "when one has ligamentous injuries?", and he responded: (Tr. 43)

> "Yes, muscles or muscle spasm, and of course, after she gets up, or after she got up, that's why she felt better with activity - those muscles will stretch and get warmed up and so forth and they will not be as uncomfortable."

On seeing Mrs. Richard on November 28 she complained of fatigue in addition to her other complaints and he considered that this was secondary to her injuries and he continued to prescribe medication because he felt such medication "was indicated to relieve this muscle spasm symptom that she was having * * *." (Tr. 44) On his examination of December 13, 1966, he found Mrs. Richard was very nervous and he put her on tranquilizers. (Tr. 45)

On his examination of January 10, 1967, there was general complaint of both the upper and lower back and her complaints now were associated with stiffness of the muscles. As to this new development Dr. Schexnaildre's testimony reveals the following: (Tr. 46)

> "Q. I see. Now, isn't it to be expected that there is some muscle distress upon sitting too

long when one has a back injury - isn't that something to be expected?

A. Yes.

"Q. Wasn't her complaint of that consistent with what you had found to exist in her lower back?

"A. Well, it is consistent with the muscle spasms."

His examination of February 13, 1967, demonstrated similar complaints with an extension of them including tenderness to palpation in the right upper back just to the right of the spine in the upper part of the back. As a result of this examination Dr. Schexnaildre prescribed cervical traction treatment. (Tr. 48) Significantly x-rays made on this occasion demonstrated a straightening of the bony segments of the spine and this was attributed to muscle spasm secondary to the injury in the cervical area. In speaking to the nature of this type evidence the following illustrates Dr. Schexnaildre's expert view: (Tr. 49)

"Q. And that is objective absolute evidence of some type pathology in the back?

"A. Yes."

Examination on February 24, 1967, demonstrated that the traction treatment had been effective inasmuch as her neck condition had improved but she still had complaints of pain in the lower back as well as in the thoracic. On this occasion she developed a "burning sensation" in the upper part of her back and this finding according to Dr. Schexnaildre was indica-

tive of nerve damage or ligamentous damage. The following is edifying: (Tr. 51-52)

> "Q. Burning sensation? Now what is the significance of a burning sensation associated with a history of accident?
> "A. Well, it could be indicative of nerve damage or some ligament damage."

In commenting upon the nature of this developing symptomatology the following testimony is helpful to an understanding of the type injury sustained by Mrs. Richard: (Tr. 52)

> "Q. Is it characteristic of this type accident that it takes a little time before the full symptomatology is finally settled and developed? I mean can you determine - isn't it a fact that it takes some time to determine the full depth and scope of the residual complications of this type injury?
> "A. Yes, I imagine so."

Dr. Schexnaildre saw Mrs. Richard for the last time on April 5, 1967. Between February and April he spoke with her on numerous occasions and Mrs. Richard continued to register the same general complaints which characterized her condition at all times prior thereto since the occurrence of the accident. On this last occasion when he saw her she complained of pulling sensation in the neck upon engaging the neck in certain motions. Dr. Schexnaildre thought this condition was "due to muscle spasm" and that this was

secondary to the injury in question. (Tr. 55) She still complained of a burning sensation around the seventh cervical vertebra as she had done before. Dr. Schexnaildre discontinued seeing Mrs. Richard because there was nothing more he could do for her than to prescribe muscle relaxants and traction treatment and administer analgesics. The following summarizes the attitude: (Tr. 56)

> "Q. Did you feel that you could do anything further for her at that time?
> "A. No, I didn't feel that I could at all, and I explained that to Mrs. Marie - I explained that to her before I sent her to Dr. Duncan.
> "Q. What more can be done, doctor, for a person who has soft-tissue injury of the cervical and lumbar areas than give them muscle relaxants and traction treatment and analgesics. What more can be done really?
> "A. That's all.
> "Q. And that only palliates it - that does not cure it - that only helps to relieve the symptoms, isn't that true?
> "A. I would say so."

Dr. Duncan, to whom Dr. Schexnaildre referred Mrs. Richard, on examining x-rays made of her at his request discovered a curvature of the lower back and also a decrease in the normal lordosis of the cervical spine. (Tr. 88) He also found suggestive disc narrowing at cervical vertebrae 5 and 6. (Tr. 89) He advised also that assuming the symptomatology described by Dr. Schexnaildre the symptoms were related to the in-

juries sustained as a result of the accident in question and that tightening of the anterior longitudinal ligaments secondary to injury could account for the decrease of the lordosis of the cervical spine demonstrable on x-ray. Dr. Duncan further stated that in his opinion the burning sensation experienced by Mrs. Richard could be related to a nerve irritation in the neck, "it could relate to injury of the neck." (Tr. 93) It was his further professional judgment that the point of origin of the irritation that would bring about this burning sensation would be from the area of the "fifth, sixth, seventh, of the cervical vertebral level." (Tr. 93) This type sensation in his opinion would be due to "impingement upon the nerves coming from the spinal cord and through the little conduits." (Tr. 94)

Dr. Duncan was questioned concerning pertinent anatomical structures. Particularly he was questioned as follows and gave the following answers which accounts for the burning sensation experienced by Mrs. Richard: (Tr. 95-96)

"Q. Are there soft tissue structures that line the bony structures that form the foramin through which the nerve roots come out?
"A. There are sheaths that surround the nerve and enclose them — covering them.
"Q. Can these sheaths that encase and enclose the nerve roots, themselves, be injured as a result of what is described by Dr. Schexnaildre as a whiplash type injury?
"A. Yes.

"Q. When these sheaths are injured, do they undergo a degenerative change?

"A. They can stiffen and cause impingement of nerves and symptoms such as you are trying to bring out here.

"Q. Do they have a tendency because of their bleeding to attach themselves to the bony surroundings through which the nerves go?

"A. It is possible for them to become adherent — to become fixed to the tissues so that there is not as free a gliding mechanism of the tissues with motions of the neck.

"Q. If they are adherent, Doctor, would that adherence show on x-ray?

"A. No.

"Q. It would not. Would that type adherent due to injury of the sheaths of the nerves have the capability of creating a burning sensation as she described?

"A. It would set up a mechanism whereby a nerve would be irritated and cause a burning sensation and go out and on the course of the nerve that might be involved.

"Q. What you are saying is, "yes", this has the capability in this particular case?

"A. It is possible, yes.

"Q. Well, given that history, Doctor, and the finding — I think you stated there was some narrowing in the area — would such a complaint be consistent with such an injury to her cervical area or the nerve sheaths or both?

"A. It could be consistent."

Dr. Duncan further testified that the demonstrable defect in the bony segments of her lower back was capable of becoming a pain producing factor as a result of the injury which Mrs. Richard sustained and thus could account for some of her complaints in her lower back. (Tr. 97) It was his opinion that Mrs. Richard had sustained injuries to the soft-tissue structures of both the cervical and lumbar area. At the urging of defendants Dr. Duncan was shown x-rays made of Mrs. Richard on the day following the accident. On examining these x-rays he found no evidence of any forward subluxation of cervical four and cervical five nor posterior subluxation of these two segments; nor minimal posterior lipping of the inferior edge of the body of cervical five. This is of overriding significance in view of the fact that x-rays made on May 16, 1967, disclosed the existence of these significant changes indicating degenerative changes secondary to trauma. Thus the value of Dr. Duncan's testimony exists only when it is contextually related to the signs and symptoms existing before and after his examination and also the disclosures made by x-rays made subsequent to his examination as will be illustrated hereinafter.

Plaintiff next produced the testimony of Dr. Fred Webre, an orthopedic surgeon of Lafayette, who examined Mrs. Richard on December 7, 1966, in connection with her complaints arising from this accident. (Tr. 117) The history he elicited from her is comparable to that testified to by Dr. Schexnaildre already mentioned. He also examined x-rays made on the date of the accident by Dr. Boustany in Lafayette. He testified that these x-rays did not demonstrate any

evidence of abnormality except some minimal narrowing of C-5 and 6 intervetral disc space and a small spur on the anterior inferior aspect of the vertebral body of C-t. These x-rays demonstrated significantly however a reversal of the cervical lordotic curve. Incidentally this was a consistent finding throughout the period that Mrs. Richard has complained of her neck condition. This is objective evidence of muscle spasm bringing about the abnormal reversal of the lordotic curve. In any event according to Dr. Webre after his first examination of her it was his opinion that she had received a cervical strain of her neck and of her lower back as a result of the accident. (Tr. 120)

He describes receiving a complaint from Mrs. Richard on this occasion of numbness in her right leg, of radiation of some pain down the thighs behind the leg into the knee. Such complaints according to Dr. Webre is expected when one receives injury to the lower back. The following testimony from Dr. Webre is pertinent to this question: (Tr. 121)

> "Q. In other words, this is a symptomatic expression of symptomatology in the low back, is that right?
> "A. That's correct.
> "Q. It is something that the doctor will look for or will expect to hear the patient complain about if that person has a pathology in the low back — a condition in the lower back — an injury to it, is that correct?
> "A. That's correct.

"Q. So such a complaint would consistent, then, with pathology or injury to low back?
"A. Yes sir.

* * * * *

"Q. You stated that she complained of some numbness. Is numbness a sign that, likewise, is expected to be found on a patient who complained or where there is some pathology of the low back?
"A. Yes sir."

The entire testimony of Dr. Webre is to the unarguable effect that the x-ray evidence and his examination of Mrs. Richard on the occasion in question completely supported her claim of injury to the soft-tissue structures of the cervical and lumbar area and that all of her complaints were consistent with that type injury. Significantly Dr. Webre testified that x-ray evidence of the reversal of the curvature of the neck appearing demonstrably is evidence of muscle spasm. If subsequent x-rays made demonstrates a normal curvature and again later x-rays demonstrate a reversal of the curvature, that would be proof positive of injury to the soft-tissue structure. X-rays made of Mrs. Richard's neck established that very fact and thus established conclusively the serious nature of her injuries. It is because of the behavior pattern of such injuries that more than one examination is required for a physician to make a reliable judgment as to such a condition. This is pointed out by Dr. Webre in these words: (Tr. 134)

'Q. And this points up the fact that it takes several examinations in order to reach a reliable, efficient professional conclusion of the extent of injury and the degree of injury, is that true?
"A. Yes sir."

Dr. Webre advised that it is characteristic of this type injury for the symptoms to vary from good to bad and back and forth and that this particular characteristic accounts for the fact that on some occasions physicians examining the same patient at different times will differ as to their findings. The following testimony is pertinent: (Tr. 135)

"Q. Alright, then, the capability of this type injury to vary from good to bad and back and forth accounts for the fact that some physicians when they examine the patient - the same patient - may not find any outstanding evidence of injury, whereas another physician will examine the same patient. but on a different day, if the symptoms are worse, will find existing symptomatology to convince him of some injury to the area involved, is that true, sir?
"A. That is very possible."

As to the duration of complaints and its significance in evaluating the permanency of injury there is the following pertinent testimony by Dr. Webre: (Tr. 137-138)

"Q. Dr. Webre, does the persistency of complaints referable to these injured areas over a long period of time - does that indicate or give you some index into the degree of injury that the party may have sustained as to whether it is a tearing of some of the vital parts involved?
"A. We think so, yes.
"Q. And if there is a tearing of the vital parts - we are talking about the ligaments, the capsules, the sheaths of the nerves, etc. — is a tearing of this type structure a permanent type injury?
"A. It is permanent to the extent if it does not heal — usually these heal relatively well.
"Q. And if there is a persistency of complaints over a long period of time does that mean that they have not healed?
"A. Or they have healed with scar.
"Q. Now, this scar is permanent?
"A. Yes sir.
"Q. And if the complaints are referable to the scarring of the soft tissue structures, then, these complaints to that extent, since the scarring is permanent, will remain permanent themselves?
"A. If that be the case, yes.
"Q. And that would be a complaint that would be consistent with that type injury?
"A. Yes sir."

Significantly Dr. Webre informed the jury that there is a difference between a sprain and a strain of soft-tissue structures. The burden of that difference is that

a strain is a stretching of these structures and a sprain is a tearing of them. He informed the court and the jury however that an initial diagnosis of strain may be subject to modification to that of sprain by subsequent development of the condition itself. In other words what a physician may initially believe to be a strain injury of these structures because of the persistency of the symptomatology he will then become convinced and be in a position to make a sound reliable professional judgment that in fact the initial diagnosis was wrong and that there was in fact a tearing of these soft-tissue structures. The following exemplifies the point: (Tr. 144-145)

> "Q. Following through on the differentiation between a 'sprain' and a 'strain' of the cervical spine and the lumbar spine involved in this particular case, I ask you this question - it is true, is it not, that the initial diagnosis of 'strain' may be subject to modification to that of 'sprain' by the subsequent development of the condition itself, isn't that true?
>
> "A. That is possible.
>
> "Q. In other words, what a physician may initially believe to be a 'strain' or a pulling of the soft-tissue structures, as you have described it, subsequently he may become convinced, that in fact, there was a 'sprain' because of the development of the condition subsequent to his initial evaluation — that's a fair statement, isn't it?
>
> "A. Yes, sir.

Dr. Webre did not have occasion to examine Mrs. Richard frequently. He did state however that if six months after she sustained her initial injuries there was x-ray evidence demonstrating subluxation or displacement of the vertebral bodies, this would be evidence, objective and unarguable evidence, of ligamentous instability secondary to tearing type injury of them. His testimony to this effect appears as follows: (Tr. 146)

> "Q. Now, then, in this case assuming then that, say, in May, six months, approximately, after the occurrence of this particular trauma, or the accident in question, that x-ray evidence demonstrated a subluxation of at least two of the vertebral bodies of her cervical spine, a displacement forward of these bodies, as well as a displacement backward upon the reversal of the position of the neck, itself, would that be x-ray evidence in your judgment of ligamentous instability that would have its origin in the accident in question?
> "A. If it showed that, yes, sir.
> "Q. And if x-ray evidence demonstrates this at this time, post the trauma itself, would that be also x-ray evidence of ligamentous instability consequent upon injuries to ligaments or soft-tissue structures around the vertebral bodies?
> "A. Yes sir."

Again it is emphasized that such x-ray evidence does exist unarguably in this case and thus establishes

without question the severity of Mrs. Richard's injuries and the permanency of their duration.

Dr. Boustany's testimony was next introduced to the jury by Mrs. Richard. Dr. Boustany happened to be the physician on duty at the time that Mrs. Richard was brought to the hospital in Lafayette following the accident. While Dr. Boustany did not have any records with him because some of his records had been destroyed in a fire that occurred subsequent to Mrs. Richard's accidental injuries, he did testify that on examining her immediately after the accident occurred he was of the opinion that she sustained injury to the soft-tissue structures of her neck and he described this as a "whiplash injury to the cervical region." He prescribed medication for her and recommended that she go to her physician in her home town for further evaluation. While the short period of time that Dr. Boustany spent with Mrs. Richard indicated to him that she only had a strain of the cervical soft-tissue structures, he did not have an opportunity by repeated examination or even extensive examination to make a reliable judgment as to that. Because of his short examination of her he stated that he thought if she only had this type injury she should recover within six to eight weeks. The following however attests to the fact that he felt inadequate to express a reliable judgment: (Tr. 155)

"Q. Doctor, when a condition persists beyond that period of time, does that indicate, or would that indicate that she had experienced a

greater degree of injury than was perceptable on the day that you examined her?

"A. It is possible, but I have no knowledge to substantiate that statement, because I saw Mrs. Richard only this one time and it was for a very short period of time."

Dr. Boustany was called to the witness stand to testify simply because he had initially examined her. Plaintiff had the inescapable duty to do this, otherwise it would be presumed that had she not brought him, he would have testified adversely to her interest. His testimony therefore is and was of no significant help other than to establish that immediately after the accident Mrs. Richard manifested signs and symptoms indicative of soft tissue structure injury.

Dr. Blaise Salatich, orthopedic surgeon, New Orleans, Louisiana, next testified on behalf of Mrs. Richard. His testimony is accompanied by the now quite well known and recognized excoriation of him verbalized and developed by insurance company attorneys. It was Dr. Salatich's opinion that Mrs. Richard had sustained a tearing of the ligamentous, musculo-fascial and periarticular and capsular soft tissue structures overlying and adjacent to the cervical vertebrae, more outstanding on the right side, and that she had sustained a similar type injury to the lower back area and primarily the lumbo-sacral area. It was his view that her injuries were of a permanent nature and have been and continue to be disabling. Dr. Salatich pointed out that x-rays made of Mrs. Richard some six months after the occurrence of the accident

as compared to earlier ones demonstrated conclusively degenerative changes secondary to the injuries initially incurred by her. It was his further opinion that Mrs. Richard would require further orthopedic treatment in the future. As to her ability to return to gainful employment Dr. Salatich said: (Tr. 201)

> "She described her occupational duties as requiring more than undue standing and walking - she described them as requiring a great deal of use of her arms and hands, checking out, raising and picking up packages, objects, turning to use her arms and her hands in opposite directions hundred or thousands, as she said, times a day. That, I think, she should refrain from doing — not only that type of work, which I am rather definitely convinced that she was incapable of doing comfortably, continuously, efficiently and safely, but that she should refrain from this type of occupational activities in the future if she wants to either stay fairly comfortable and as happy as possible. * * *"

In opposition to this overwhelming volume of expert testimony as to the physical condition of Mrs. Richard defendants called Dr. Cedric W. Yowry, to whom she was referred to examination, to testify on their behalf. It is noteworthy for this court to understand that defendants were not interested in securing an unbiased opinion from this physician concerning Mrs. Richard's physical condition. On the contrary their counsel's letter to this doctor is calculated to bias him against

plaintiff. In requesting Dr. Lowry to examine plaintiff defendants' counsel made the following unsolicited statements in his letter of March 26, 1968. At the outset he said/"you are probably very familiar with Dr. Salatich's reputation and familiar with the testimony which he usually gives. We have not taken his discovery deposition as yet, but do expect him to find the plaintiff suffering from a total disability."

In speaking of Dr. Webre in this letter defendants' counsel further gratuitously observed: (Tr. 256)

> "Dr. Fred Webre, an orthopedist in Lafayette, with whom you are also probably familiar, examined Mrs. Richard on one occasion and his findings were essentially negative."

Dr. Lowry testified however that he was not supplied with Dr. Webre's report nor was a copy of his report offered so that he could make an independent evaluation of what Dr. Webre in fact had found. In speaking further of Dr. Webre the letter continues, "He did find some tenderness and felt that the same was legitimate. He expected the same to subside within a relatively short period of time." Counsel then occupied himself with thoughts of Dr. Duncan. As to Dr. Duncan he said: (Tr. 256)

> "A Dr. Thomas Duncan at Ochsner Clinic has also examined the plaintiff and although we have not taken his discovery deposition as yet, we do understand that his findings were also essentially negative."

Dr. Lowry states however that counsel did not supply him with a report of Dr. Duncan so that he could make an independent evaluation. Counsel next inserts the following gratuity: (Tr. 257)

> "The treating physician, Dr. Schexnaildre, in Franklin indicated in his discovery deposition that Mrs. Richard would have recovered from all problems resulting from the accident within a couple of months."

Defendants' counsel terminates his effort with the following declaration, "We felt that this information might be of some benefit to you in connection with your examination."

Dr. Lowry complained that he had requested the opportunity to see the reports of these physicians and x-rays made by them but this request was refused. The following exemplifies the point: (Tr. 257)

> "(Dr. Lowry) A. No, I told him that I would like to see the reports and x-rays of the doctors.
> "Q. Did he supply you with this?
> "A. He supplied me with information taken from depositions - *he did not give me a report.*"

Defendants entire motivation in writing this letter is made crystal clear by the following quotation from the letter in question: (Tr. 257-258)

"From the defense standpoint of this case, we feel that it would be quite advantageous, as I take it, to be able to show that over various intervals of time three different orthopedists found Mrs. Richard to be asymptomatic as a result of the accident or just about asymptomatic. This would of course be assuming that their examination is negative. *This would aid us in our impeachment of Dr. Salatich.*"

Despite this effort to enlist Dr. Lowry in a partisan effort to impeach Dr. Salatich, he testified that x-ray evidence developed by him demonstrated a straightening of the normal lordonic curve in the cervical area of Mrs. Richard's body. As to the significance of this the following testimony is pertinent: (Tr. 260)

"Is this straightening sometimes secondary to spasm?

"A. Yes.

"Q. Was it your judgment on this examination that this straightening which you were able to demonstrate on x-ray was secondary to spasm?

"A. It could be.

"Q. Well, as a reasonable medical probability was that your judgment that this was due to muscle spasm?

"A. *Yes, that would be it.*

"Q. Then muscle spasm is secondary to some irritative factor such as lesion of the liga-

ments or other soft tissue structure in the cervical, right?

"A. Yes.

"Q. And then, as a physician, then, this is the type evidence that is described and known and accepted as objective evidence of some pathology in the neck, is that true?

"A. That is correct.

"Q. So, then, it is the effect of your testimony that as to this neck you found an objective evidence of pathology to this neck?

"A. (Tr. 261) Yes sir."

He further stated that the limitation of motion or rotation which he found on examination of Mrs. Richard was consistent with pathology in the neck. (Tr. 262) His following testimony is similarly pertinent: (Tr. 262-263)

"Q. Now, Doctor, if this straightening is due to muscle spasm and considering the span of time that had expired from the date of the accident to the time that you examined her, would you say that she had some, perhaps, tearing of some of the soft tissue structures that were persisting at the time in expressing symptomatology commonly associated with that type?

"A. I would not say that tearing persisted - she could have scar tissue or residual which manifest itself by the same findings.

"Q. And scar tissue on this type structure will remain forever - I mean it is permanent?

"A. Yes.
"Q. A permanent development, is that correct?
"A. Yes."

He also states that the accident in question was capable of rendering symptomatic the developmental defect in her lower back and that on the occurrence of such an event this developmental condition could bring about a pain producing situation that could account for her complaints in the lower back area. In short his testimony does not militate against the overall thrust of the medical evidence demonstrating profound soft tissue structures injuries accompanied by permanent residuals.

Viewed against the backdrop of this undisputed evidentiary record one is hard put to understand the rationale of the majority opinion. The majority opinion is simply not rooted in a sound judicial approach, that is, one measuring up to the rigorous demands of due process and fair play. Judge Tate properly characterizes the effort of respondent court in rendering its majority opinion in these words:

> "After a three day trial in which the trial judge and jury had an opportunity to observe Mrs. Richard constantly, the trier of fact concluded that she was permanently disabled and awarded her $21,200. No application was made to the trial judge to reduce the verdict as excessive. Yet this court rediagnoses the causes of Mrs. Richard's disability, finds her symp-

toms of pain imaginary and her undoubted loss of wages unnecessary, and reduces the award in half. On the basis of the cold record and thirty minutes of oral argument, we find she was cured five months after the accident, although without dispute she remained away from work and still was under a doctor's treatment at the time of the trial, some eighteen months after the accident.

* * * *

"In reducing the award, the majority concludes that Mrs. Richard was able to return to work five months after the accident. We base this conclusion on the testimony of several doctors who saw Mrs. Richard only once (as compared with her attending specialist, who saw her frequently over an extended period of time), and most of whom saw her only in the first three or four months following the accident - - at a time when, although she was still complaining, the permanence or not of her symptoms could not be evaluated except as a *guess*.

"In holding that the lady's undoubted loss of several thousand dollars wages was unnecessary (and that her physician erred in his diagnosis recommending that she stay away from work), we overlook that the examining doctors acknowledge that, if indeed the symptoms of pain did persist until the trial some

seventeen months later, then they themselves were erroneous in their optimistic assumption in the early days following the accident that the lady's serious injuries were only temporary. Reading the cold record, without benefit of observation of the plaintiff and possibly her pain-lined demeanor and guarded movements, we assume that her symptoms of pain are imaginary or malingered, even though every physician who examined her found at least some objective evidence of them (although perhaps evaluated such residual as temporary or not as intense as that of which the lady complains).

"With great respect for my brethren of the majority, the writer feels that once again we are overlooking the primary function of appellate review of quantum. It is not to reduce all awards which appear to us to be high. It is not for ourselves the reevaluate the medical testimony, because we have personal confidence in some specialists and not in others, based on assumptions or knowledge gained from our own experience outside the record and not before the trier of fact."

Indeed when the evidence as a whole fairly is considered there is not support for the majority opinion that the jury committed manifest error in its award of damages. When relatrix's loss of wages and other expenses incurred are subtracted from the total amount of the award it is obvious that the jury's award for

pain and suffering is consistent with the overwhelming jurisprudence. For example in *Luquette v. Bouillion,* 184 So.2d 766, an award of $15,000.00 for pain and suffering alone was granted for similar injuries. In *Lomenick v. Schoefler,* supra, an award of $10,000.00 for pain and suffering alone was similarly granted for cervical injuries. In *Poleman v. Employers Liability Insurance Corporation,* 164 So.2d 630, an award of $10,000.00 was approved for a housewife suffering from whiplash type injuries. In *Mathews v. Employers Mutual Fire Insurance Company of Wisconsin,* 180 So.2d 38, an award of $16,000.00 was granted to a woman who sustained injuries similar to those sustained by Mrs. Richard. Many other cases could be cited and drawn to the attention of the court in support of relatrix's position that the jury award should not be disturbed. For our purposes it is sufficient to say that each case must be determined on the basis of its own peculiar facts. In the instant case a somewhat protracted trial was conducted and all aspects and avenues of controversy were exhaustively explored. The jury had the opportunity to see and hear the witnesses. They took into consideration all of the evidence and resolved whatever conflict that might reside in that evidence in favor of the award that was granted to relatrix. In making this award the jury necessarily considered the uncontradicted evidence that the special damages sustained by relatrix exceeded the sum of $7,000.00, exclusive of any award for future loss of wages which the evidence indicated would be sustained by relatrix. This verdict represents the unanimous opinion of twelve fully qualified jurors. There is nothing in the evidentiary record to suggest that the jury abused its great dis-

cretion in assessing these damages. The verdict therefore should have been honored by the respondent court. The respondent court, therefore, committed grievous error in reducing the award by over fifty percent.

Error No. 2

IT WAS ERROR FOR RESPONDENT COURT TO HAVE REDUCED THE JUDGMENT AS TO PAST LOSS OF EARNINGS, WHERE RELATRIX REFRAINED FROM ENGAGING IN GAINFUL EMPLOYMENT ON THE ADVICE OF HER TREATING PHYSICIAN

The majority decision in reducing the amount of loss of wages sustained by relatrix is contrary to the well established jurisprudence of this state. Inasmuch as I cannot improve upon the succinctly apt statement of Judge Tate on this particular error, I take the liberty of quoting from his dissenting opinion:

> "Before discussing the record in detail, it may be appropriate to point out an obvious error of law of the majority.
>
> "The trial was held almost eighteen months after the accident. At that time Mrs. Richard had lost *seven thousand dollars wages,* most of which the majority disallows.
>
> "Without contradiction the evidence shows that Mrs. Richard had tried to return to work twice but was unable to continue because of

complaints of pain. It further shows without contradiction that her attending specialist (Dr. Salatich), who examined and treated her repeatedly between May 16, 1967, and the trial a year later, had advised her to refrain from working because, due to his diagnosis of her injuries, her work as cashier would cause pain and aggravate her symptoms. Tr. 198-99, 201-2.

"Assuming most favorably to the appellant that Dr. Salatich's diagnosis and advice were incorrect, nevertheless the tortfeasor is responsible for these additional damages resulting from the tort-caused personal injury. Where a person has suffered personal injury by reason of another's negligence, the tortfeasor is liable for any additional harm and expense caused the injured person by the mistake (or negligence or lack of skill) of the attending doctor. Thibodeaux v. Potomac Insurance Co., La. App. 1st Cir., 201 So.2d 159, 165-67; Hudgens v. Mayeaux, La.App. 3d Cir., 143 So.2d 606, certiorari denied; Kimball v. Audubon Insurance Co., La. App. 1st Cir., 103 So.2d 525; Annotation, 100 ALR 2d 808, 813 (1965); Restatement of Torts 2d, Section 457 (1965); 25 CJS 'Damages', Section 20; 22 Am Jur 2d 'Damages', Sections 112-14."

Error No. 3

THE RE-EXAMINATION BY RESPONDENT

COURT OF THE JURY FINDINGS AND MODIFICATION OF ITS AWARD, WHERE NO APPLICATION FOR REMITTITUR WAS MADE IN THE TRIAL COURT, DENY RELATRIX OF HER CONSTITUTIONAL RIGHTS SECURED TO HER BY THE FIFTH, SEVENTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Significantly defendants did not complain that they did not receive a fair trial; that the jurors did not act fairly and impartially; that they were in any way denied of the opportunity fully and fairly to present their side of the case; that rulings of the trial judge are either erroneous or in some way impaired defendants in their quest to effectively present available evidence to the jury. They raised no such complaint because there simply exists no basis for such a complaint. Moreover defendants did not seek a remittitur before the trial court and thus did not give an opportunity to the trial judge, who heard and saw the witnesses, to state his opinion as to the propriety of the award made by the jury. In such a context, it is respectfully submitted, where an appellate court reexamines the findings of fact made by the jury and supplants its own interpretation of these facts and its own view of the weight to be attributed to the testimony of he witnesses, for that of the jury, there results a denial of due process in that thereby a litigant is denied of trial by jury.

Trial by jury has always been regarded as a basic and fundamental feature of American jurisprudence,

and since the organization of our government, has been incorporated in the form of express guarantees in the Constitution of both state and federal governments. Trial by jury, said the court in *Tharp v. Kitchell,* 9 So.2d 461, 35 C.J. 147, is a bulwark of protection for the common man in the democratic form of government. History holds that nothing is more fundamental, nothing is held more inviolate, and nothing is more concommitant to liberal democracy than one's right to be judged by his peers. It stands out as a notion of the common man's political right which pervades the entire fabric of the democratic cloth. In its daily implementation it represents the dynamic participation of the governed in their government, the essential expression of the will of the people in a system of free institutions to which they have given their consent, and the partial fulfillment of the ancestral pledge of a government of the people, for the people and by the people.

The framers of the Louisiana Constitution obviously did not regard the right to trial by jury as something less significant, less necessary than did the descendants of the colonists who insured its perpetuation by ensconcing it in the Bill of Rights. On the contrary, by authority of the highest command, the framers of the Louisiana Constitution gave a mandate to the Legislature of Louisiana to institute trial by jury. Louisiana Constitution, Article 7, Section 41, provides:

> "The Legislature *shall* provide for the election and drawing of competent and intelligent

jurors for the trial of civil and criminal cases * * *."

Consistently throughout the years the Legislature has kept faith with the framers of the Louisiana Constitution by giving to litigants the right to have their property rights and liberty tried by juries. Currently, the right to trial by jury is recognized and implemented by the provisions of Article 1731 of the Louisiana Code of Civil Procedure and the succeeding articles relating thereto.

Before extending further an examination of the Code, it is appropriate here to pause momentarily to contemplate the historic function of juries. In essence, jurors are the triers of the facts involved in any litigation triable by jury. In fact, they are the exclusive triers of the facts and conduct their services under the supervision of a trial judge guided by instructions as to the law given by the Court. They constitute a body of men who are sworn to declare the facts of a case as they are proved from the evidence placed before them.

Courts and Legislatures are practically unanimous as one in their diligence to protect against intrusion the province of the jury as sole judge of the facts. It is a principle of universal application, almost without exception, which prevents judges from commenting on the facts for fear of improperly influencing jurors in the exercise of their prerogative as the sole judges of the facts. Louisiana embraces this principle. Significantly, Article 1792 of the Louisiana Code of Civil Procedure provides:

> "In his charge to the jury the Judge shall instruct the jurors on the law applicable to the cause submitted to them, but he shall not recapitulate or comment upon the evidence so as to exercise any influence upon their decision as to the facts."

Scrupulous regard for the province of the jury in this respect is in the highest tradition of the judiciary. It accommodates the function of the jury and insures the continuance of trial by jury. It leaves the jury free to do that which the law charges it to do, namely, weigh the evidence and pass upon its credibility. *Cheffey v. Pennsylvania Railroad Company*, 79 F. Supp. 252. And in the historic context of trial by jury, the jury verdict is conclusive if the evidence, though disputed, contains probative facts sufficient to support it, however much the trial court or appellate court may disagree with the findings of fact. *Basham v. Pennsylvania Railroad Company*, 83 S.Ct. 965 (1963); *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500, 77 S.Ct. 443 (1957); *Lavender v. Kuran*, 327 U.S. 645, 66 S.Ct. 740 (1946). Indeed it is a denial of trial by jury for the trial court to increase the amount of the verdict on ground that it is inadequate. *Springer v. J. J. Newberry Company*, 94 F.Supp. 905, Aff. 191 F.2d 915.

This would appear to be the law of Louisiana in respect to the authority of the trial court to disturb the verdict of the jury. A search of the Louisiana Code of Civil Procedure which regulates trial by jury in Louisiana, fails to disclose the existence of any law

which authorizes the trial court to supplant its conclusion as to the facts for that of the jury. On the contrary, the authority of the trial court to disturb the verdict of the jury appears to be somewhat restrictive. Indeed it appears that the only peremptory ground for granting a new trial in connection with jury cases is that contained in Article 1814, C.C.P. Furthermore it appears that the trial court is without any authority whatever to alter the verdict of the jury as to the amount of the award. It is true that he may enter a remittitur or an additur, but then only with the consent of the party affected and only as an alternative to the granting of a new trial, C.C.P., Article 1813. In my view, it is somewhat doubtful whether the provisions of C.C.P., Article 1973, which invests the trial court with the discretionary grounds for granting a new trial, applies to jury trials. In any event, this much can be stated unequivocally, and it is that the Legislature obviously did not intend trial courts to have authority to alter the findings of the jury for otherwise it would not have enacted the provisions of C.C.P., Article 1813 and 1814. Seemingly, therefore, the authority of the trial courts in reference to jury verdicts is limited to the granting of a new trial and then only for good cause. This in turn simply means that the Legislature intended the findings of fact made by juries to be conclusive, absent the misbehavior of the jury that results in a denial of impartial justice, C.C.P., Article 1814; or the making of an award which shocks the conscience or sense of fair play, C.C.P., Article 1813.

This constraint imposes itself similarly upon the appellate courts. Necessarily an appeal from a jury

verdict does not present for review the weight and credibility of the evidence. Such questions come to the appellate courts authoritatively resolved by the jury, whose exclusive province it is to make such findings. The jury's judgment is the judgment of the litigants' peers. It is the consummate product of democracy's promise, the fulfillment of democracy's function in respect to trial by jury.

A contrary view is logically and legally impermissible. For if the wisdom of the jury is supplanted by the critical judgment of an appellate court, then indeed there exists no legal creature such as trial by jury. In such a perspective, trial by jury is but a figment of the imagination, the vagary of legal sophistry. Such a proposition mocks justice. It defies logic, decries tradition, and denies a litigant of a legal birthright.

There is for review not the sufficiency of the probative facts, but the *existence* of them. That is the basic question presented. Absent the existence of probative facts in probable support of the verdict, the judgment cannot stand. Then it becomes the institutional function of appellate courts to reverse the judgment.

An inquiry by an appellate court into the facts for the purpose of making a determination concerning the existence of probative facts that may tend to support the verdict is authorized by the provisions of Louisiana Constitution, Article 7, Section 29, which provides that appeals to the Court of Appeal of Louisiana shall be both upon the law and the facts. And if upon examina-

tion, the appellate court should determine that there exists no probative facts whatever to support the verdict, it then has the authority to reverse the judgment.

Heretofore, it is submitted, our appellate courts have fallen into error in the interpretation of the authority vested in them in relationship to the facts involved in jury cases. The courts have erroneously assumed that the provisions of Louisiana Constitution, Article 7, Section 29, empower them to supplant the verdict of the jury with its own decision, simply because they have authority to review the facts. It is my considered view that the provisions of Louisiana Constitution, Article 7, Section 29, and Article 7, Section 41, which institute trial by jury, must be considered in pari materia in such a manner as to give effect to both. It is submitted that when such an approach is made these provisions of the Constitution easily are reconcilable. In such a perspective, in respect to trial by jury, the appellate jurisdiction of the Court of Appeal exists in an unctuous relation to the historic function of juries. i.e., appellate courts will review the evidence to determine the existence of probative facts supportive of the verdict, and not to determine the sufficiency of such facts, in order that trial by jury may become a reality and the integrity of jury verdicts may be maintained.

Such a proposition does not present as startling a departure from the past as may be suggested upon first analysis. In the first place, as I have pointed out, it is apparent that the Legislature never intended that trial judges should have the power to disturb the verdicts of juries. In my view, trial judges are prohibited from

supplanting their decision of the facts for that of the jury. It is not unusual that a similar proscription should apply to the appellate courts. On the contrary, its application to the appellate courts appears reasonable and rationally sound. After all, judges of the appellate court do not have the opportunity to observe and hear the witnesses as they testify as do judges of the trial courts. And if judges of the trial courts, who are in a better position to evaluate the testimony of the witnesses than judges of the appellate courts, are prohibited from altering the findings of fact of the jury, a fortiori, a similar proscription reasonably should exist in relation to the institutional function of the appellate courts. Jury verdicts, therefore, should not be disturbed or altered by the appellate courts, where there exists probative facts in support of their findings.

Viewed in such a context, then the question which was presented to the respondent court was whether or not there existed probative facts which gave probable support to the verdict of the jury in the assessment of damages. Upon making such a finding that such probative facts did exist, when the reviewing function of the respondent court became exhausted and the appeal should have been dismissed as presenting nothing for review.

Even defendants never contended on appeal that there was no evidence supporting the verdict. The essence of their contention related exclusively to the degree of that proof as they in their partisan evaluation considered that proof. As heretofore pointed out, however, their contention even in this respect was unsup-

ported by the evidence. In any event, even if it were otherwise, because there is credible evidence supporting the verdict, the appeal should have been dismissed. The legal criterion applicable in such a situation on appeal is defined by the court in LAVENDER, in these words: (66 S.Ct. at P. 744)

> "That such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. *Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses, and arrive at a conclusion opposite from the one reached by the jury.*
>
> * * * *
>
> "It is no answer to say that the jury's verdict involved speculation and conjecture. *Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.* ONLY WHEN THERE IS A COMPLETE ABSENCE OF PROBATIVE FACTS TO SUPPORT THE CONCLUSION REACHED

> DOES A REVERSIBLE ERROR APPEAR. But where, as here, there is no evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. *And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."*

It is respectfully submitted, therefore, that the questions of negligence and quantum came to the respondent court authoritatively resolved by the jury and inasmuch as there exists probative evidence from which the jury verdict may reasonably be concluded, it was reversible error for the respondent court to have reduced the jury award.

It is relatrix's position that her right to trial by jury and the rights accruing to them as an incidence thereof are protected by the provisions of Article 7 of the Bill of Rights of the United States Constitution, which stipulates:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined by any court of the United States, then according to the rules of the common law."

As a further alternative, relators contend that the right to trial by jury is a fundamental right, the sine qua non of due process implicit in the concept of ordered liberty and made obligatory on the states by the provisions of the Fourteenth Amendment to the Constitution of the United States.

The question before the Court is not whether or not the Seventh Amendment or the Fourteenth Amendment for that matter of the United States Constitution compels the State of Louisiana to grant to relators the right to trial by jury. This question does not arise, inasmuch as the State of Louisiana already has granted to relatrix the right to trial by jury. The question which is presented is whether or not the re-examination by any court of the jury verdict constitutes a denial of trial by jury in the historic sense of the word and within the context of the provisions of the Seventh Amendment of the United States Constitution and whether such a denial is proscribed by the provisions of the Fourteenth Amendment to the Constitution of the United States. It is relatrix's contention that the right to trial by jury, with the corollary right not to have a fact tried by a jury re-examined by any court, expresses a rule so fundamental and essential to a fair trial, and so to due process of law, that it is made mandatory upon the states by the Fourteenth Amendment. Furthermore, the State having granted relatrix trial by jury, it necessarily has granted relatrix the corollary right which prohibits any court for re-examining a fact already tried by a jury. Seemingly for the Court to deprive a litigant of such a fundamental right would constitute a denial of due process, inas-

much as the trial by jury forms an integral part of due process.

Many of the provisions of the first several Amendments to the Constitution of the United States, traditionally considered to lay constraints only upon the national courts, have been held to be obligatory upon the states by the provisions of the Fourteenth Amendment. The First Amendment's Freedom of Speech, Press, Religion, Assembly, Association and Petition for Redress of Grievances, has been held to be obligatory on the State through the Fourteenth Amendment. *Gitlow v. New York,* 268 U.S. 652, 666, 45 S.Ct. 625, 629, 69 L.Ed. 1138 (1925); *Lovell v. City of Griffin,* 303 U.S. 444, 450, 58 S.Ct. 666, 668, 82 L.Ed. 949 (1938); *Staub v. City of Baxley,* 335 U.S. 313, 321, 78 S.Ct. 277, 281, 2 L.Ed.2d 302 (1958); *Grosjean v. American Press Co.,* 297 U.S. 233, 244, 56 S.Ct. 444, 446, 80 L.Ed. 660 (1936); *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940); *De Jonge v. Oregon,* 299 U.S. 353, 364, 57 S. Ct. 255, 259, 81 L.Ed. 278 (1937); *Shelton v. Tucker,* 364 U.S. 479, 486, 488, 81 S. Ct. 247, 251, 252, 5 L.Ed.2d 231 (1960); *Louisiana, ex rel., Gremillion v. NAACP,* 366 U.S. 293, 296, 81 S. Ct. 1333, 1335, 6 L.Ed.2d 301 (1961); *Edwards v. South Carolina,* 372 U.S. 229, 83 S.Ct. 680 (1963). Similarly the commands of the Fifth Amendment were made obligatory on the states. *Chicago B & O R.R. Co. v. Chicago,* 166 U.S. 226, 235-241, 17 S.Ct. 581, 584-586, 41 L.Ed. 979 (1897); *Smyth v. Ames,* 169 U.S. 466, 522-526, 18 S.Ct. 418, 424-426, 42 L.Ed. 819 (1898). Likewise the Fourth Amendment's prohibition of unreasonable searches and seizures, *Wolf v. Colorado,* 338 U.S. 25, 27-28, 69 S.Ct.

1359, 1361, 93 L.Ed. 1782 (1949); *Elkins v. United States*, 364 U.S. 206, 213, 80 S.Ct. 1437, 1441, 4 L.Ed.2d 1669 (1960); *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961), and the Eighth Amendment's proscription on cruel and unusual punishment, Robinson v. California, 370 U.S. 660, 686, 82 S.Ct. 1417, 1420, 8 L.Ed. 2d 758 (1962). And lastly the Sixth Amendment's guarantee of counsel has been held to be obligatory on the States through the Fourteenth Amendment inasmuch as the court found this to be a right implicit in the concept of ordered liberty. *Gideon v. Wainwright*, 83 S.Ct. 792 (1963).

Relatrix respectfully submits that the right to trial by jury means, in terms of due process, that the findings of fact shall be made by jury and once these findings are made, they cannot be re-examined by any court. That is the historic meaning of jury trial. This right was granted to relatrix in the instant case by the Legislature of Louisiana. It is respectfully submitted that the function of appellate courts is to vindicate this right and not to destroy it by usurping the function of the jury and substituting for its verdict the court's critical analysis of the evidence, especially where it has not the opportunity to evaluate existing demeanor evidence. And as the Constitution of the United States applies to all branches of State government, the proscription of the Seventh Amendment to the United States Constitution, acting through the Fourteenth Amendment, constitutes a constraint upon the authority of the Court of Appeal, Third Circuit, to have re-examined the facts tried by the jury; moreover to have substituted its own interpretation of

these facts for that of the jury. As such the decision complained of deprives relatrix of her constitutional liberty and therefore should be reversed.

CONCLUSION

It may be that the time has arrived when this court should take another serious look at its past works in the area of appellate jurisdiction, relating to the question of the force and effect of fact controversies resolved by juries in civil cases. Scarcely a day goes by without a complaint or challenge being registered against the exercise of the current appellate jurisdiction of the Louisiana judiciary in that area. In fact at this writing there are no less than eight original actions filed in the United States District Court at Baton Rouge, Louisiana, against appellate judges of the Court of Appeal, First Circuit, concerning the exercise of its appellate jurisdiction. There is doubt and division among the judges of all of our courts as to the feasibility, propriety and workability not to mention fairness of this appellate jurisdiction as exercised by our courts. In fact the instant decision exemplifies this division.

The fact of the matter is that the present system simply does not seem workable. The guidelines forged by this court in GASPARD for the exercise of appellate jurisdiction in regard to the jury determination of facts consists chiefly of two principles: (a) a great discretion is reposed in the jury, and (b) each case must be decided on its own merits. However laudible, to say the least these concepts are elastic indeed. In their daily implementation they seem to be wholly

impracticable. For example, in determining or attempting to determine or evaluate the exercise of discretion by the jury, is an allowance made for demeanor evidence? Or is the exercise of that discretion to be evaluated entirely upon the basis of the cold print of the record? The recent jurisprudence of this state instances innumerable reversals by appellate courts of jury verdicts as to the fact question of liability, despite the existence of credible evidence supporting the verdict. In such cases obviously the appellate courts made no allowance for demeanor evidence. It was impossible to make such an allowance, because the appellate courts involved had not seen or heard the witnesses. Yet for over 100 years this court has consistently held that demeanor evidence is indispensable to an effective evaluation of the credibility of witnesses, and thus to due process. In such cases the appellate courts are simply not equipped to efficiently, convincingly and fairly evaluate the exercise of the discretionary powers of the jury. This simply means that the guidelines of GASPARD are simply impracticable. Additional there are just too many endemic variables involved in these guidelines.

For example in the instant case to Judge Savoy of the Third Circuit the lesson of GASPARD simply means that the appellate court has the unrestricted authority to supplant its judgment for that of the jury on the simple predicate of disagreement in degree as to the purport and impact of the evidence in any given case. And apparently "disagreement in degree" is equated with "abuse of discretion" of the jury. On the other hand to Judge Tate and Judge Miller of the Third Cir-

cuit "abuse of discretion" is not to be equated with "disagreement in degree" and because of LOMENICK, an offspring of GASPARD, the decision authored by Judge Savoy is judicial contraband.

Not the slightest intimation is to be inferred from my comments that the majority opinion in the instant case is the product of willful or in any way dishonorable judicial conduct. The burden of my observation simply is that the elasticity, the vagueness and the variability of the guidelines established by GASPARD allow for the interplay of personal preferences, predilictions and judicial misadventures to the detriment of litigants and to the undermining of the time-honored institution of jury trials.

No one who fairly reads the provisions of the Louisiana Code of Civil Procedure dealing with trial by jury can convincingly deny that the Legislature intended for each of the citizens of this state a trial by jury in the common law concept of that term as interpreted by the courts of the several states of the union and the United States Supreme Court. The Legislature obviously never intended that the fact findings of the jury should ever be re-examined. As pointed out in the earlier parts of this application, the Legislature went so far as to prohibit the trial judge from even making comment on the facts of the case. Obviously this proscription was enacted so as to eliminate any possible influence upon the independent judgment of the jury as to the facts. To acknowledge this but at the same time to assert that an appellate court, the judges of whom never hear or see the witnesses, has the authori-

ty, and should exercise it in such a way as, to re-examine the fact findings of the jury is to take a position that is unrealistic, not to say wholly irreconcilable.

The solution to this undesirable situation is not insurmountable. The power of this court to resolve that problem is unquestioned. The solution to the problem rests in the establishment of a judicial rapprochement between Article 7, Section 29 of the Louisiana Constitution, which provides that appeals to the Court of Appeal of Louisiana shall be both upon the law and the facts, and the provisions of Article 7, Section 41 which institutes trial by jury. If these constitutional provisions are considered in *pari materia* in such a manner as to give effect to both the problem presented by this application would never again exist. If this court were to hold that in respect to trial by jury the appellate jurisdiction of the Court of Appeal exists in an unctuous relation to the historic function of juries, i.e., appellate courts are empowered to review the evidence to determine the *existence* of probative facts supportive of the verdict and not to determine the *sufficiency* of such facts, the raging controversy under consideration would come to an end. In such an event the people of this state would be granted trial by jury as contemplated by the Legislature in the enactment of the Code of Civil Procedure touching that question. Our appellate courts would still retain jurisdiction to control and supervise such trials effectively and consistently with the Legislative intent to grant to the people trial by jury.

The alternative of course to a refusal of this court to give to the litigants of this state such a meaningful interpretation of the State Constitution is a resolution of this problem by the federal judiciary. This of course simply invites unnecessary intrusion into the affairs of state. Such an intrusion is unnecessary because this problem can be solved by a willing State Supreme Court without becoming embroiled in the greater question of whether or not the proscription of the Seventh Amendment as to re-examination of jury verdicts applies to the State either directly or through the operation of the Fourteenth Amendment.

Either in an ever-evolving universe or an ever-evolving parochial society no single thing is ever constant, except change; thus nothing is ever unchangeable. In a free marketplace of ideas, under the constant pressure of a dynamic intelligence, no single idea is either constant, foreyer suitable or forever desirable. The best idea, however, will necessarily prevail. Its acceptance is always retarded by a nostalgic attachment to the past, or an intransigence born of an imagined fear, or an intractability born of a fierce attachment to preference. In the end, however, the calming mood of objectivity, the progeny of reason, like the best idea, necessarily prevails, to permit reception of the best idea.

May I respectfully urge the court to objectively evaluate the unarguable reasons which demonstrate that the present rule of appellate review of jury trial essentially defeats the fact of jury trial and thus denies to the citizens of this State the right to jury trial.

In its raw nakedness, may I submit, this rule is but a peremptory *must* without a tempering *why*. In a free marketplace of ideas, however, the *why* is the catalytic agent which makes a peremptory *must* unacceptable in the family of reason.

WHEREFORE RELATRIX PRAYS that a writ of certiorari, mandamus and prohibition do issue herein directed to the Honorable, Court of Appeal, Third Circuit, State of Louisiana, reversing the judgment of said Court of Appeal complained of herein; alternatively that a rule nisi issue herein directed to the Honorable, Court of Appeal, Third Circuit, State of Louisiana, ordering it to produce before this court the entire record of this cause and to show cause why the decision of said court complained of herein should not be reversed and set aside and finally why the judgment of the district court should not be reinstated.

RELATRIX PRAYS for such additional orders as they be necessary or proper.

J. MINOS SIMON
1408 Pinhook Road
Post Office Box 52116, OCS
Lafayette, Louisiana

ATTORNEY FOR
RELATRIX

STATE OF LOUISIANA
PARISH OF LAFAYETTE

J. MINOS SIMON, being first duly sworn did depose and say that he is of counsel in the foregoing application for writs of certiorari, mandamus and prohibition and that all of the allegations of fact therein contained are true and correct to the best of his knowledge, information and belief.

Affiant further states that a copy of the foregoing application has been duly mailed in properly addressed envelopes, postage prepaid, to Honorable Kenneth DeBlanc, Clerk, Court of Appeal, Third Circuit, Post Office Box 3000, Lake Charles, Louisiana, and Mr. James J. Davidson, III, Attorney for Defendants, Post Office Drawer 3507, Lafayette, Louisiana.

Lafayette, Louisiana, this 4th day of February, 1969.

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J. MINOS SIMON

SWORN TO AND SUBSCRIBED before me on this 4th day of February, 1969, at Lafayette, Louisiana.

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NOTARY PUBLIC